Supreme Court, U.S.
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No. 96-1112

In The

Supreme Court of the United States

October Term, 1996

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

We respectfully submit that the Petition misstates the question for review and that, if there be one at all, it should read as follows:

> Where, as here, the plaintiff was a freelance diver whom the defendant employer only hired on a project by project basis, must his Jones Act seaman status be determined solely from an examination of his overall service with that employer, as petitioner contends, or may it be affirmed on the basis of the year-long shipboard assignment he held at the time of his injury, as the lower court ruled?

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SUMMARY OF ARGUMENT

This was an unsung state court Jones Act[1] case. The decision below wasn't even published. There is nothing "cert-worthy" about it. The question it poses is nowise related to the ones presented in *Harbor Tug & Barge Co. v. Papai*,[2] and was answered almost two years ago in *Chandris, Inc. v. Latsis*.[3]

The *Chandris* case, of course, reminded us that seaman status under the Jones Act is a mixed question of law and fact that should be left to the jury whenever reasonable people could differ over whether the plaintiff (1) contributed to the mission of a vessel, and (2) enjoyed an employment-related connection to a vessel, or fleet of vessels, that was substantial in both its duration and its nature.[4] The jury in this case found that respondent Gilson Hoeflich ("Hoeflich") was a Jones Act seaman by a vote of twelve to nothing.[5] That finding was affirmed by the California court of appeal because "[t]here was evidence here that plaintiff had a connection substantial in duration and nature to the [tugboat] *Arctic Carolyn* and

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[1] According to that statute: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ." 46 U.S.C. § 688(a).

[2] *cert. granted*, ___ U.S. ___, 117 S.Ct. 36 (1996).

[3] ___U.S.___, 115 S.Ct. 2172 (1995).

[4] *Id.* at 2190.

[5] *Petitioner's Appendix, p. 21a.*

two seagoing barges."[6] Moving under 28 U.S.C. § 1257, petitioner Martech USA, Inc. ("Martech") seeks a writ of certiorari from that unpublished opinion on grounds:

> First, that it conflicts with this Court's rulings in *Desper v. Starved Rock Ferry Co.*[7] and *Chandris, Inc. v. Latsis;*[8]
>
> Second, that it conflicts with the lower federal court rulings in *Heise v. The Fishing Company of Alaska, Inc.,*[9] and *Antus v. Interocean S.S. Co.;*[10] and,
>
> Third, that it poses an important federal question similar to the ones currently before this Court in *Harbor Tug & Barge Co. v. Papai.*[11]

We respectfully urge this Court to deny Martech's petition.

First of all, far from conflicting with *Chandris*, the opinion below followed that decision *verbatim*. Respondent Hoeflich was a freelance diver who worked for Martech on a project-by-project basis. His basic assignment thus changed from one hire to the next. The accident at bar occurred during a shipboard assignment to the seagoing tugboat *Arctic Carolyn*, shortly after Martech had hired him to work as its lead diver on the Point Loma Sewer Outfall Extension Project. Although Hoeflich was

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[6] *Petitioner's Appendix, p. 7a.*

[7] 342 U.S. 187 (1952).

[8] *supra.*

[9] 79 F.3d 903 (9th Cir. 1996).

[10] 108 F.2d 185 (6th Cir. 1939)

[11] *cert. granted,* ___ U.S. ___, 117 S.Ct. 36 (1996).

maimed on the first day of diving, his assignment to that project was slated to last for over a year, and required him to work, dive, live, eat and even sleep aboard an identifiable fleet of seagoing construction vessels. Turning a blind eye to that year-long vessel-nexus, petitioner contends that the state court should have looked, instead, to the other assignments Hoeflich received during his overall service with Martech. But as this Court explained in *Chandris*:

> "[W]e see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. When a maritime worker's basic assignment changes, his seaman status may change as well. *See Barrett* [*v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1077 (5th Cir. 1986)] (Rubin, J., dissenting) ('An assignment to work as a crew member, like the voyage of a vessel, may be brief and the *Robison*[12] test is applicable in deciding the worker's status during any such employment') [Citation]. For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office

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[12] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

> and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea." *Chandris, supra,* 115 S.Ct. at 2191.

In sum, the decision below was in complete accord with *Chandris*.

Nor can Petitioner argue that it conflicted with *Desper v. Starved Rock Ferry Co.*,[13] *Antus v. Interocean S.S. Co.*,[14] or *Heise v. Fishing Company of Alaska, Inc.*[15] Unlike the plaintiffs in those cases, all of whom were shore-based shipyard workers injured in port while repairing vessels that had been laid up for the winter, Respondent Hoeflich was a deep sea diver crippled on the ocean floor while manning an operating tug two-and-a-half miles off the California coast. In short, the cases on which Martech floats its petition are distinguishable and inapposite.

The same may be said of Martech's suggestion that its petition is somehow related to the issues and arguments this Court heard last January 13 in *Harbor Tug & Barge Co. v. Papai*. Certiorari was granted in *Papai* to decide: (1) Whether an injured maritime worker could still prosecute a Jones Act claim after an administrative law judge had formally determined that he was not a seaman, but an LHWCA[16] beneficiary at the time of his accident, and if so; (2) Whether the inquiry into that

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[13] *Supra*.

[14] 108 F.2d 185 (6th Cir. 1939)

[15] 79 F.3d 903 (9th Cir. 1996).

[16] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*.

worker's seaman status could extend to vessel-assignments he had received from employers other than the one in whose service he was injured. In contrast to the situation in *Papai*, Respondent Hoeflich was never awarded LHWCA benefits, or deemed a longshore worker, by an administrative law judge. Indeed, despite its sedulous insistence that he was an LHWCA beneficiary, Martech neither paid Hoeflich workers' compensation nor even notified its longshore carrier that he'd been injured. But unlike John Papai, Respondent Hoeflich tightened his belt, eschewed an interim administrative hearing and awaited his Jones Act jury. The state court was thus the first and only tribunal to consider his claims.

What is more, as even the petitioner points out, Hoeflich has insisted all along that his seaman status should "sink or swim" on the basis of his year-long reassignment as Martech's lead diver off Point Loma.[17] Unlike John Papai he never suggested to the jury, the court of appeal, or anyone else, that his seaman status could be gleaned from his service with other employers. As the verdict confirmed, he didn't have to.

Gilson Hoeflich was injured performing a classic seaman's job that involved a lengthy and continuous commitment to the mission of the Point Loma construction fleet. The jury therefore awarded him the protection of the Jones Act by a vote of twelve to nothing. Despite Martech's arguments before this Court, it is *not* paying him interim compensation under the LHWCA. In fact, its LHWCA carrier insists that Hoeflich was a Jones Act

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[17] *See Petition for Writ of Certiorari, pp. 7-8.*

seaman. Thus, until his Jones Act verdict can be executed, the Respondent must bear his disability on his own.

BASIS FOR JURISDICTION

Since the petition invokes jurisdiction under 28 U.S.C. § 1257, and since that statute only reaches "*[f]inal* judgments or decrees rendered by the highest court of a State in which a decision could be had",[18] it is worth noting that Martech is currently moving the trial court to vacate our judgment on grounds that it was void and premature.[19] Thus, even while it assures this Court that the state court judgment was "final" for the purposes of § 1257, Martech is telling the trial court that said judgment "is nonfinal because it does not dispose of the outstanding maintenance claim."[20] We don't share Martech's views,[21] and have opposed its motion to

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[18] [emphasis added].

[19] *See* Defendant's Notice of Motion and Motion to Vacate the 'Final Judgment After Appeal', or, in the alternative, to Stay Enforcement of the 'Final Judgment After Appeal', Respondent's Appendix pages (hereinafter referred to as "App.") 60-62.

[20] *See*, Memorandum of Points and Authorities in Support of Defendant's Notice of Motion and Motion to Vacate the 'Final Judgment After Appeal', or, in the alternative, to Stay Enforcement of the 'Final Judgment After Appeal', App. 63-68.

[21] Briefly, our complaint against Martech stated counts for Jones Act negligence, general maritime unseaworthiness, and maintenance and cure. All three counts, of course, state claims under federal maritime law. *See e.g., Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Because we ultimately withdrew the maintenance and cure count from the jury's consideration,

vacate.[22] But if we're wrong and Martech is right, the decision below is not strictly "final", because it leaves some loose ends in state court.[23] We only raise this point because the petitioner did not.

COUNTER STATEMENT OF THE CASE

The Jones Act was passed by Congress to offset " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' "[24] This Jones Act case concerns an accident that befell Gilson Hoeflich on the ocean floor two-and-one half miles off Point Loma, California while he was diving from the *Arctic Carolyn* in the foul mouth of an undersea sewer. The unique submarine hazards he encountered there put an end to his career.

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and entrusted it to the trial judge for post verdict proceedings (*R.T. 1187-1188*), Martech contends that we "bifurcated" the trial. In Martech's view, the state court of appeal failed to take that bifurcation into account, and therefore acted precipitously, when it remanded the case back to the trial court "with directions to enter judgment in accordance with the special verdict." *Petitioner's Appendix, p. 8a.*

[22] In a nutshell, we contend that Hoeflich effectively waived the maintenance and cure count when he requested the directions that the court of appeal ultimately included in its remand.

[23] *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277-278 (1980). *See also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975).

[24] *McDermott Intern'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991).

Hoeflich had been a commercial diver since 1977.[25] Like most divers he worked freelance.[26] Though he dove several years for Martech, he was not a "steady" or "permanent" employee, but was hired on a project-by-project basis.[27] Just prior to the Point Loma project he'd been diving for a Canadian company on a salvage job in the Mediterranean.[28] But after winning a major diving subcontract to help extend the City of San Diego's Point Loma sewer outfall another three-and-a-half miles into the Pacific, Martech rehired Hoeflich for the dive team it was putting together.[29] The company engaged him as one of its "key personnel", for "the length" of the job, and recommended that he and his wife move to San Diego.[30] The project, after all, was slated to last for "over a year."[31] The construction, and all its attendant diving, would take place in 210 to 300 feet of water, between two-and-one-half and six miles offshore, from three specially equipped diving vessels – the tugboat *Arctic Carolyn* and the seagoing crane barges *Haakon* and *Betty L.*[32]

Martech's work began on September 9, 1992, and didn't wind down until November 24, 1993.[33] Once the project got up to speed, the divers toiled from the *Carolyn*

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[25] *Reporter's Transcript ("R.T.") 258-259*, at App. 13-15.

[26] *R.T. 410*, at App. 23-24.

[27] *R.T. 410-411*, at App. 23-25.

[28] *R.T. 334-335*, at App. 19-21.

[29] *R.T. 108-109*, at App. 2-5.

[30] *R.T. 108-109, 265-266, 849*, at App. 2-5, 16-18, 32-33.

[31] *R.T. 265*, at App. 16-17.

[32] *R.T. 118-119, 883-895*, at App. 5-7, 35-51, 58.

[33] *R.T. 33, 265*, at App. 1-2, 16-17.

and her consorts twelve-hours-a-day, five-and six-days-a-week.[34] Hoeflich had even planned to eat, sleep, and live aboard ship.[35] Had he not been injured, he would've continued diving with the Point Loma construction fleet until Martech's work was done. Indeed, even after the accident, Martech assured its general contractor that Hoeflich would be back on the project just as soon as his wounds had healed.[36] But they never did.

As things turned out, Hoeflich was permanently disabled on the first day of diving when he struck himself in the left foot with the laser-sharp jet of a sawed-off waterblaster while working inside the sewer, with no training, visibility or metatarsal guards, 210 feet below the surface of the Pacific. The pulsing waterblaster blew a hole through the top of his foot and injected raw feces into the wound.[37] After Martech finally got him to the surface, Hoeflich was hospitalized for 6 weeks, endured 13 surgeries, suffered fulminating infections, and nearly lost his foot.[38]

We filed his inevitable Jones Act claims in San Francisco Superior Court on March 31, 1993. Though Martech had theretofore paid all his medical expenses, together with a few months' wages, it terminated those benefits

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[34] *R.T. 224-226, 849-851,* at App. 8-11, 32-35.

[35] *R.T. 242-243, 264, 904,* at App. 11-13, 15-16, 51-52.

[36] *R.T. 108-110, 409-410,* at App. 2-5, 22-24.

[37] *Plaintiff's Trial Exhibit ("PX") 32, p. 1. R.T. 300, 433-434, 592,* at App. 18-19, 26-30, 59.

[38] *R.T. 592-93, PX 30,* at App. 29-31, 69-75.

when we served the complaint. We therefore filed a parallel LHWCA claim, on August 24, 1993, in an attempt to rekindle those interim payments.[39] But we abandoned that attempt after Martech's workers' compensation insurer controverted our LHWCA claim on grounds that Hoeflich was a seaman[40] and admonished us to "fi[le] for benefits under the Jones Act."[41]

The Jones Act case was eventually called to trial on December 8, 1994. At the close of the evidence the trial judge denied a defense motion for a directed verdict because, as he put it: "I think you have a fair jury issue on Jones Act seaman status."[42] The jury considered that issue and returned their verdict on January 5, 1995. Among other things, they specifically found that Hoeflich "was a Jones Act seaman" by a vote of 12 to 0, and awarded him $1,315,458 in damages.[43] But on February 28, 1995, the trial court granted Martech a judgment notwithstanding the verdict because the *Arctic Carolyn* had dropped anchor shortly before the accident and was therefore "out of navigation". Reasoned the jnov:

> "If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation before the plaintiff arrived, and he

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[39] August 24, 1993 LS-203, at App. 76-80.

[40] November 15, 1993 LS-18, at App. 81-83.

[41] September 28, 1993 LS-207, at App. 84-86.

[42] *R.T. 1175*, at App. 56-57.

[43] *Petitioner's Appendix, pp. 21a-24a.*

> did not further the tug's mission of providing a dive platform."[44]

But as this Court explained in *Chandris, Inc. v. Latsis*, " 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.' "[45] Relying on that decision, the California Court of Appeal therefore reversed the jnov in an unpublished opinion dated July 23, 1996. As the Court of Appeal summed up:

> "*Chandris* announced a two-pronged test for determination of seaman status under the Jones Act: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation or to an identifiable group of such vessels, that is substantial in terms of both its duration and its nature. *Chandris* emphasized that the purpose of the second requirement was to "[S]eparate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to perils of the sea." [citations omitted][46]

Noting that the "*Arctic Carolyn's* mission was to support divers performing work on the underwater sewer outfall, and [that] plaintiff's work as a diver was essential

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[44] *Petitioner's Appendix, pp. 16a-17a.*

[45] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2192.

[46] *Petitioner's Appendix, p. 6a.*

to that mission",[47] the Court of Appeal concluded that "[t]he dispositive inquiry here is whether plaintiff meets the second *Chandris* prong, i.e., whether his connection to the vessel from which he was diving at the time of his injury was sufficiently substantial in terms of both its duration and nature to afford him Jones Act protection."[48] It answered that inquiry affirmatively. To quote the opinion once again:

> "There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project was expected to last approximately one year, with dives from the *Arctic Carolyn* and two seagoing barges."[49]

Though the parties have freighted their briefs with bulging appendices, we respectfully submit that this Court need look no further than that key excerpt to deny Martech's petition.

REASONS FOR DENYING THE WRIT

I.

THE STATE COURT'S DECISION WAS IN COMPLETE ACCORD WITH *CHANDRIS, INC. V. LATSIS.*

Martech is mistaken when it suggests that the decision below conflicts with *Chandris, Inc. v. Latsis*. As we

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[47] *Id.*

[48] *Id.*

[49] *Id.*, p. 7a.

saw, our state court of appeal relied on that opinion to the letter. It is therefore important to remember that the "second *Chandris* prong" is "not merely a temporal concept".[50] Quoting the oft' cited deep sea diving case of *Wallace v. Oceaneering Intn'l.*,[51] *Chandris* emphasized that, " 'the total circumstances of an individual's employment must be weighted to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.' "[52] It's impossible to imagine a sea-based maritime employee whose work exposes him more intimately or regularly to those perils than Gilson Hoeflich's. As *Wallace* put it, "A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."[53] While *Wilander* told us that this fact was not necessarily determinative,[54] *Chandris* explained that we could nonetheless "weight" it when considering "the total circumstances" of the plaintiff's employment.[55] Given the "total circumstances" of this case, we took the position that our particular Jones Act seaman's status "sinks or swims with [his] assignment at the time of the accident."[56] *Chandris* supports that position.

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[50] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191.

[51] 727 F.2d 427, 432 (5th Cir. 1984).

[52] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2190.

[53] *Wallace v. Oceaneering Intn'l, Inc., supra,* 727 F.2d at 436 [original emphasis].

[54] *McDermott Intn'l., Inc. v. Wilander,* 498 U.S. at 354.

[55] *Chandris, supra.*

[56] *R.T. 934-935,* at App. 52-55.

"In defining the prerequisites for Jones Act coverage", *Chandris* "eschew[ed] the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves."[57] While it agreed that "a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman", it stressed that "[t]his figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases."[58] To repeat a key passage from this Court's opinion in *Chandris*:

> "[W]e see no reason to limit the seaman status inquiry, as petitioners contend, to an examination of the overall course of a worker's service with a particular employer. When a maritime worker's basic assignment changes, his seaman status may change as well."[59]

Putting aside the desultory issue of whether respondent Hoeflich spent more than 30 percent of his overall employment with Martech in the service of a vessel (and there was abundant evidence to show that he did), we proved, the jury found, and the appellate court affirmed that his basic assignment changed from project to project. Sometimes he worked as a supervisor or a tender, and other times he worked as a diver. Sometimes he worked on a fixed oil platform, and other times he dove from a vessel. Sometimes he dove in rivers and lakes, but most

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[57] *Chandris, supra.*

[58] *Id.* at 2191.

[59] *Id.*

times he dove in the open ocean.[60] It is undisputed that, at the time of his accident, Hoeflich was diving in the Pacific Ocean, more than 2.5 miles off Point Loma, from a vessel in navigation. As both the jury and the appellate court recognized, his reassignment to the Point Loma project was slated to last for more than a year and involved a regular and continuous commitment of his time and toil to the mission of the construction fleet assembled there. It also involved an intimate and near-fatal exposure to the peculiar perils of a polluted sea. As *Chandris* summed up:

> "Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position."[61]

The decision below is naught but an unpublished application of that principle.

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[60] *Petitioner's Appendix, pp. 25a-26a.*

[61] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191-2192.

II.

THE STATE COURT'S DECISION DID NOT CONFLICT WITH *DESPER V. STARVED ROCK FERRY COMPANY* OR ANY OTHER FEDERAL DECISION.

Turning its back on the dispositive passages from *Chandris*, and dredging up something it christened "the 'expectant seaman' doctrine", Martech next suggests that the decision below conflicts with this Court's opinion in *Desper v. Starved Rock Ferry Co.*, and with the circuit court opinions in *Heise v. Fishing Co. of Alaska* and *Antus v. Interocean SS Co.* But not one of those cases concerned a "seaman-in-being" who was injured aboard an operating vessel in the early stages of a long seagoing assignment. To the contrary, they each involved a once and future seaman who was hurt while engaged as a "seasonal repair worker"[62] aboard a dead vessel that had been withdrawn from navigation.

Thomas Desper was killed in a machine shop while painting life preservers from a small fleet of sightseeing boats that had been hauled out of the ice-bound Illinois River and placed on blocks for the winter.[63] John Heise was injured alongside a pier repairing the main engines and cracked fuel tank of a fishing vessel that had "completed its work for the fishing season and put in at Seward, Alaska for repairs and annual maintenance."[64] Mr. Antus was injured in the backwaters of Lorian, Ohio cleaning the bilges of a Great Lakes steamer that had

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[62] *Desper, supra*, 342 U.S. at 191.

[63] *Id.* at 188-189.

[64] *Heise v. Fishing Co. of Alaska, Inc., supra*, 79 F.3d at 904.

been "withdrawn from navigation" for the winter.[65] Unlike respondent Hoeflich, who was maimed 210 feet beneath the open ocean while diving from a voyaging tugboat during a year-long assignment to a seagoing construction fleet, these men came to grief on a dead vessel in a dockyard during a shore-based interlude. They only "hoped [they] would be able to stay with the ship when she sailed."[66] Martech's other citations are equally inapposite.[67]

We don't quarrel with the notion that "the law does not cover probable or expectant seamen but seamen in being."[68] This is just another way of stating the obvious principle that "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well."[69] The plaintiffs in *Desper*, *Antus* and *Heise* were injured during a seasonal assignment as shore-based repair workers. Respondent Hoeflich was maimed during a year-long assignment as a seaman in being. As we said at the outset, this case is simply not "cert-worthy". Our state court's decision was on all fours with the maritime law.

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[65] *Antus v. Interocean SS Co., supra*, 108 F.2d at 186.

[66] *Heise, supra*, 79 F.3d at 905.

[67] *Baker v. Pacific Far East Lines*, 451 F.Supp. 84 (N.D. Cal. 1978) [plaintiff injured while working as a member of a "shoreside maintenance gang" upon a barge tied up for repairs]; *Sullivan v. American President Lines, Ltd.*, 206 F.Supp. 547 (N.D.Ca. 1961) [plaintiff injured while working "on dry land" as a member of a shoreside "maintenance gang" upon a life boat "up on chocks at Pier 50, San Francisco"].

[68] *Desper, supra*, 342 U.S. at 191.

[69] *Chandris, supra*, ___ U.S. at ___, 115 S.Ct. at 2191.

III.

THE STATE'S COURT DECISION WAS NOWISE RELATED TO *HARBOR TUG & BARGE CO. V. PAPAI.*

In a final effort to catch the Court's attention, Martech contends that the opinion below decided a question that is "related" in form to the ones posed by *Harbor Tug & Barge Co. v. Papai*. But this lure contains no hook.

Papai was argued last January 13th. Unlike this one, that case sat squarely astride the "zone of uncertainty" that connects the Jones Act with the LHWCA.[70] Ever since its decision in *Southwest Marine, Inc. v. Gizoni*,[71] this Court has recognized that there is an overlap between those two statutes. It granted certiorari in *Papai* to clarify the collateral consequences of that overlap.

While the statutes are mutually exclusive, it is "'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act".[72] The issue in *Papai* was whether an employee who'd been formally adjudged a longshore harbor worker and not a seaman, following a full administrative hearing, should be collaterally estopped from proving otherwise in a subsequent Jones Act case. But there is no such issue here. Respondent Hoeflich never even received voluntary LHWCA payments, much less a fully adjudicated award. The San Francisco Superior Court was the first and only tribunal to consider his case.

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[70] *Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

[71] 502 U.S. 81 (1991).

[72] *Gizoni, supra*, 502 U.S. at 91.

The vexing questions of mutual exclusivity, issue preclusion, and collateral estoppel, that distinguished *Papai*, never surfaced here. Neither did the issue of "casual" or "common employer" seaman status.[73]

Noting that John Papai belonged to the Inland Boatman's Union, and that the IBU typically assigned its members to different employers "on a day-to-day basis",[74] the Ninth Circuit held that: "If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system."[75] *If* it concludes that he can still prosecute a Jones Act case after winning a formal LHWCA award, this Court may consider whether John Papai can support his claim to seaman status with the vessel assignments he received from other employers. But that does not mean it should defer denying Martech's petition for certiorari in this case.

Our state court did not apply, quote, or even cite the Ninth Circuit's *Papai* opinion,[76] and we didn't prove, argue or allege that Hoeflich's Jones Act status should be gleaned from his service for anyone but Martech. Remembering that his basic assignment changed from project to project, we've always insisted that his standing

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[73] *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995).

[74] *Id.* at 204.

[75] *Id.* at 206.

[76] *Petitioner's Appendix, pp. 1a-9a.*

as a seaman should "sink or swim" with his year-long assignment off Point Loma. The jury agreed. Whatever Martech might suggest, the California Court of Appeal did not decide a question that related in any way to the peculiar issues posed in *Papai* when it ultimately affirmed that jury. It merely followed this Court's holding in *Chandris*. There is nothing "cert-worthy" about the opinion below.

CONCLUSION

Chandris tells us that if a maritime worker is "reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel", he or she is a Jones Act seaman.[77] Deep sea diving is a classic seaman's job.[78] What is more, our particular deep sea diver's reassignment to the Point Loma construction fleet comprised a regular and continuous commitment to the *Arctic Carolyn* and her consorts. Unlike Thomas Desper or John Heise, and just like Antonios Latsis, the plaintiff in *Chandris*, Gilson Hoeflich was injured at sea during a long assignment to a voyaging vessel. Unlike John Papai, he has never been accorded the benefit of interim LHWCA compensation. In fact, despite the gravity of his wounds, the permanency of his disability, and

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[77] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191-2192.

[78] *Wallace v. Oceaneering Intn'l,* Inc., *supra. See also, The Highlander,* 12 Fed.Cas. 136 (D. 1859) [salvage diver held seaman]; *The Murphy Tugs,* 28 F. 429 (E.D. Mich., 1886) [salvage diver held seaman].

the findings of a unanimous jury, Martech flatly refuses even to provide for his injured foot's ongoing medical needs pending the outcome of this appeal. When we wrote Martech's Jones Act carrier, London Underwriters, to request orthotic care for that still "deteriorating" foot[79] in the wake of our verdict, they declined on grounds that "Mr. Hoeflich is not a Jones Act seaman" and referred us to "CIGNA, Martech's L&H carrier."[80] But when we turned around and petitioned CIGNA for interim assistance, they wrote back that Mr. Hoeflich was a Jones Act seaman and therefore "not eligible for benefits under the LHWCA."[81] As should be painfully apparent, the Respondent won't be able to escape this frustrating trap until we're finally able to enforce his judgment.

WHEREFORE we respectfully urge this Court to deny Martech's Petition for Writ of Certiorari.

Dated: February 13, 1997

Respectfully submitted,

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[79] March 29, 1996 Declaration of Victor Taconelli M.D., at App. 87-88.

[80] October 13, 1995 Letter from George J. Koelzer, at App. 89-90.

[81] April 1, 1996 Letter from Roger Levy, at App. 91-93.

APPENDIX TO HOEFLICH BRIEF IN OPPOSITION

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[1] VOLUME I

December 12, 1994

* * *

[33] PROGRAM FOR SAN DIEGO, AND ALSO SOUTHERN CALIFORNIA IN ITS ENTIRETY, WAS IMPROVING AND EXPANDING THEIR SEWERAGE SYSTEMS. SO THE INTENT WAS THAT THE POINT LOMA EXTENSION WOULD BE THE FIRST OF HOPEFULLY MANY PROJECTS THAT WE BID TOGETHER.

Q. WE AGAIN IS MORRISON-KNUDSEN AND MANSON?

A. CORRECT.

Q. JUST SO THE JURY IS CLEAR, M.K., OR MORRISON-KNUDSEN, HELD 60 PERCENT AND MANSON 40 PERCENT OF THE OWNERSHIP?

A. CORRECT.

Q. MR. STEARNS, APART FROM THE REPAIR PROJECT AND THE ULTIMATE OUTFALL EXTENSION PROJECT, HAS THE P.L.C. JOINT VENTURE PERFORMED ANY OTHER WORK TO DATE?

A. NOT P.L.C.

Q. WHEN WAS THE POINT LOMA OUTFALL EXTENSION PROJECT COMPLETED?

A. THE OFFICIAL COMPLETION DATE WAS NOVEMBER 24, 1993.

Q. AND AS THE FILM INDICATED, THAT PROJECT TOOK PLACE ESSENTIALLY IN THE WATERS WEST OF POINT LOMA?

A. YES.

Q. DURING MY OPENING STATEMENT, I INDICATED THAT THE ORIGINAL SEWERAGE OUTFALL WAS LAID SOMETIME IN THE SIXTIES. IS THAT RIGHT?

A. '63, YES.

* * *

[108] WAS BEFORE. IT WAS TWO YEARS AGO. MY RECOLLECTION ISN'T THAT GOOD.

Q. ALL RIGHT.

LET'S TURN OUR ATTENTION TO ANOTHER TOPIC, MR. HANSON.

AS MARC STEARNS' ASSISTANT DURING THE EARLY PHASE OF THE PROJECT, DID YOU EVER RECEIVE CONTRACT DOCUMENTATION FROM MARTECH?

A. THE CONTRACT? NOT DIRECTED TO ME, NO. WE HAD A ROUTING PROGRAM WITHIN THE OFFICE THAT THINGS WOULD BE ROUTED TO, AND ANYTHING DIVING WOULD BE COPIED TO ME. BUT I WASN'T IN DIRECT CONTRACT NEGOTIATIONS.

Q. I UNDERSTAND. MY QUESTION: YOU WERE AWARE, WERE YOU NOT, THAT MARTECH WAS OBLIGED TO PROVIDE CERTAIN INFORMATION TO P.L.C. UNDER THE CONTRACT, SAFETY PROGRAMS, DIVING MANUALS, KEY PERSONNEL LISTS?

A. YES, I WAS AWARE OF THOSE THINGS.

Q. INDEED, DID YOU RECEIVE A WRITTEN KEY PERSONNEL LIST FROM MARTECH PRIOR TO THE ONSET OF DIVE OPERATIONS?

A. YES.

Q. IT WAS MARTECH'S OBLIGATION UNDER THE CONTRACT TO FURNISH YOU WITH A CURRENT LISTING OF KEY PERSONNEL, WAS IT NOT?

A. I BELIEVE IT WAS.

Q. MR. HANSON, WAS GIL HOEFLICH ON THE LIST [109] YOU RECEIVED PRIOR TO THE ONSET OF DIVE OPERATIONS?

A. YES. WE FAXED THEM A LIST OF DIVERS WHO THEY WERE GOING TO HAVE, AND WHO WE WOULD LIKE TO SEE, ON THE DIVING OPERATION. AND WE RECONCILED THAT WITH WHICH DIVERS WOULD BE – THERE WERE SOME WE WANTED THAT THEY DIDN'T WANT IN. WE TOOK THEM OUT.

Q. AT ALL TIMES MR. HOEFLICH WAS ON THE LIST?

A. YES.

Q. THERE WAS A SUGGESTION MR. HOEFLICH MIGHT NOT HAVE STAYED ON THIS PROJECT VERY LONG. AFTER GIL'S ACCIDENT DID YOU CONTINUE TO RECEIVE KEY PERSONNEL LISTS FROM MARTECH?

A. I THINK WHEN WE WOULD GO INTO A NEW PHASE. THERE WASN'T TOO MANY DIFFERENT PHASES WE WENT INTO. BUT, YES, WHEN WE WOULD GO INTO A DIFFERENT PHASE OF OPERATION, THEY WOULD TELL US WHO THEY WOULD WANT, AND WE WOULD ALWAYS SAY WHO WE WOULD LIKE TO SEE ON THAT, AND IT WOULD BE RECONCILED.

Q. THAT IS AN AFFIRMATIVE, YES, YOU RECEIVED SUCH LISTS AFTER THE INJURY?

A. YES.

Q. MR. HANSON, EVEN AFTER HIS INJURY DID GIL HOEFLICH'S NAME CONTINUE TO APPEAR ON THE KEY PERSONNEL LIST THAT MARTECH FAXED YOU?

A. I CAN'T TELL YOU ONE WAY OR THE OTHER FOR SURE ON THAT.

Q. LET ME TURN YOUR ATTENTION TO THE DEPOSITION, THE ONE TAKEN OCTOBER 20, 1993. I WILL [110] SPECIFICALLY ASK YOU TO TAKE A LOOK AT TESTIMONY WHICH IS TRANSCRIBED ON PAGE 26 LINE 1 THROUGH LINE 10.

QUESTION: AFTER GIL'S INJURY, I TAKE IT THAT HE NO LONGER SHOWED UP UP ON THE KEY PERSONAL [sic] LISTS THAT WERE SUBMITTED AFTER THAT.

ANSWER: HE WAS LISTED AS A POSSIBLE – IF – DEPENDING HOW HIS TREATMENT WENT, AS A POSSIBLE, I BELIEVE, ONE ATMOSPHERE OPERATOR, IF HE WAS OKAY.

SO MARTECH CONTINUED TO LIST MR. HOEFLICH ON THE KEY PERSONNEL LIST AFTER HE WAS INJURED IN HOPES HE WOULD RECOVER?

A. IF I SAID THAT BACK THEN, MAYBE – I WAS CLOSER TO THE DATE. BUT AS A SUB OPERATOR, IT WAS HIS SPECIALTY.

Q. "ONE ATMOSPHERE OPERATOR" WAS THE TERM YOU USED?

A. ONE ATMOSPHERE IS A SUBMARINE.

Q. ONE ATMOSPHERE IS ALSO A BELL, IS IT NOT?

A. YES, IT IS.

Q. MR. KOELZER SUGGESTED THAT THE ONLY WORK AVAILABLE FOR DIVERS ON THIS PROJECT WHO WEREN'T DIVING WAS PILEBUTT WORK.

MR. KOELZER: OBJECTION.

THE COURT: OVERRULED.

MR. HILLSMAN: Q. WAS THERE A BELL USED IN CONNECTION WITH THIS PROJECT?

* * *

[118] A. YES.

Q. YOURSELF?

A. YES.

Q. LEN WELLS AND RICK THIELMANN.

A. YES. THEY – I THINK RICK WORKED.

Q. ALL OF THE DIVERS BUT GIL HOEFLICH?

A. YES.

Q. THE BETTY L WAS OWNED BY WHOM, SIR?

A. I BELIEVE MORRISON-KNUDSEN.

Q. APART FROM THE ARCTIC CAROLYN, THE HAAKON, AND THE BETTY L, WERE DIVING OPERATIONS CONDUCTED ON A CONTINUOUS BASIS AT P.L.C. ABOARD ANY OTHER VESSELS?

A. DIVE OPERATIONS – ANY OTHER VESSEL DURING THE EXTENSION PROJECT?

Q. CORRECT.

A. MAYBE OFF A TUG BOAT ON A COUPLE OF OCCASIONS. PRIMARILY EVERYTHING WAS RUN OFF THE BETTY L OR THE HAAKON.

Q. THE TUG WOULD HAVE HAD SCUBA OPERATIONS?

A. ANYTHING. IT WOULD HAVE BEEN AN INSHORE OPERATION.

Q. SURFACE-SUPPLY MIXED GAS DIVE OPERATIONS WERE CONDUCTED PRIMARILY, IF NOT ENTIRELY, FROM THOSE THREE VESSELS?

A. YES.

Q. THE ARTIC [sic] CAROLYN WAS OWNED BY MARTECH?

A. BEST OF MY KNOWLEDGE.

[119] Q. THE HAAKON BY MANSON?

A. YES.

Q. THE BETTY L. BY M.K.?

A. YES.

Q. ALL THREE PEOPLE DIRECTLY INVOLVED IN THE POINT LOMA PROJECT.

A. YES.

Q. LET'S TURN ATTENTION AWAY FROM THE JONES ACT –

MR. KOELZER: OBJECTION. ASK IT BE STRICKEN.

THE COURT: SUSTAINED. STRICKEN.

MR. HILLSMAN: Q. LET'S TURN ATTENTION TO THE DAY OF THE ACCIDENT. WHERE WERE YOU WORKING THAT DAY, MR. HANSON, SEPTEMBER 9, 1992?

A. I WAS ON THE ARCTIC CAROLYN.

Q. WHERE DID YOU REPORT TO WORK THAT MORNING?

A. THE OFFICE ON NORTH HARBOR DRIVE OF POINT LOMA CONSTRUCTORS?

A. IS THAT IN SAN DIEGO.

Q. YES.

Q. DOWNTOWN?

A. ON THE HARBOR, NEAR DOWNTOWN.

Q. WHAT TIME DID YOU REPORT TO WORK THAT MORNING; DO YOU RECALL? BEST OF YOUR RECOLLECTION.

A. I WOULD GUESS SIX OR SEVEN.

Q. EARLY IN THE MORNING?

A. YES.

* * *

[167] VOLUME II

December 13, 1994

* * *

[224] ED THOMAS?

A. I DON'T KNOW FOR SURE AS FAR AS YEARS IN THE BUSINESS OR – I DON'T KNOW FOR SURE.

Q. WAS MR. HOEFLICH ONE OF THE MORE SENIOR MEMBERS WITH THE TEAM?

A. YES.

Q. YOU HAVE WORKED WITH GIL BEFORE; IS THAT CORRECT?

A. YES.

Q. WOULD YOU AGREE HE IS A VERY GOOD DIVER?

A. YES.

Q. WOULD YOU AGREE, IN YOUR EXPERIENCE, HE IS A VERY SAFE DIVER?

A. YES.

Q. WHEN DID YOU FIRST LEARN THAT YOU WERE GOING TO BE INVITED TO WORK ON THE POINT LOMA SEWER OUTFALL PROJECT?

A. WELL, ABOUT A WEEK BEFORE THE JOB, I THINK, WAS THE FIRST I HEARD IT WAS ACTUALLY GOING TO TAKE PLACE AND I WAS GOING.

Q. THAT WOULD HAVE BEEN ROUGHLY SOMETIME IN THE VERY EARLY PART OF SEPTEMBER 1992?

A. YES.

Q. WHO, AS YOU UNDERSTAND, HIRED YOU TO WORK ON THAT PROJECT?

A. TOM THOMAS GAVE ME A CALL.

Q. AFTER MR. HOEFLICH'S ACCIDENT, DID YOU HAVE OCCASION TO DIVE ON THE PROJECT?

[225] A. YES.

Q. AFTER MR. HOEFLICH'S ACCIDENT, DID YOU REMAIN ON THE PROJECT FOR ITS DURATION?

A. YES.

Q. ALL THE WAY THROUGH THE END OF OPERATIONS IN NOVEMBER OR DECEMBER OF '93?

A. YES.

Q. DID YOU CONTINUE TO WORK AS PART OF THE DIVE TEAM ABOARD THE HAAKON?

A. I WORKED ON THE HAAKON, YES.

Q. DID YOU WORK ON THE BETTY L., ON THE DIVE TEAM?

A. YES.

Q. DID YOU AND THE OTHER TEAM MEMBERS REPORT TO THE VESSELS DAY IN DAY OUT FOR AN EXTENDED PERIOD OF TIME?

A. YES.

Q. WHEN YOU WEREN'T ACTUALLY CONDUCTING DIVE OPERATIONS, WHAT DID YOU DO ABOARD THE VESSELS?

A. I WORKED AS R.O.V. SUPERVISOR ON THE HAAKON, AS A DIVING SUPERVISOR ON THE HAAKON.

ON THE BETTY L, I WORKED AS A STANDBY DIVER, DIVING SUPPORT FOR THE HORSE AND ONE ATMOSPHERE BELL. WORKED AS PIPE PREPARER, AS A PILEBUTT, RIGGING, WHATEVER WAS NEEDED.

Q. WHEN THERE WERE NO DIVE OPERATIONS UNDER WAY, YOUR EMPLOYERS FOUND DAY-TO-DAY JOBS FOR YOU THAT KEPT YOU WORKING ABOARD THOSE VESSELS DAY IN [226] AND DAY OUT FOR A LONG PERIOD OF TIME?

A. YES.

Q. ALL THE WAY THROUGH THE END OF THE PROJECT?

A. YES.

Q. WAS THAT ALSO TRUE OF MR. THIELST?

A. YES.

Q. IN FACT, IT WAS TRUE OF EVERYBODY ON THE DIVE TEAM BEFORE GIL HOEFLICH'S INJURY THE FIRST DAY OF THE PROJECT?

A. NO. SOME OF THE PEOPLE – WELL, YEAH, I GUESS SO.

Q. THE EXPERIENCED MARTECH HANDS, ED THOMAS, YOURSELF, MR. THIELST, MR. THIELMANN, ALL REMAINED ON THE PROJECT FOR THE DURATION?

A. THIELMANN WASN'T A MARTECH HAND EXCEPT FOR THE FIRST JOB.

Q. HE WAS THERE THROUGHOUT?

A. YES.

Q. NOW, MR. MITTRY, LET'S TURN YOUR ATTENTION TO THE DAY OF THE ACCIDENT.

AS THE RACK OPERATOR, YOU BASICALLY MONITORED THE BREATHING MIXTURE; CORRECT?

A. YES.

Q. DO YOU ALSO FILL OUT THE DIVE LOG?

A. YES.

Q. WOULD YOU TELL US WHAT THE DIVE LOG IS.

A. A SHEET OF PAPER YOU KEEP TRACK OF THE DIVER'S TIME, THE DECOMPRESSION CHAMBER TIME, AND

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[242] HAD. BUT AFTER, I HAD SPOKEN TO OTHER GUYS. AND THE PARTICULAR JOB THAT I HAD TALKED ABOUT IN THE DEPOSITION WAS AFTER.

Q. AFTER THE ACCIDENT?

A. AFTER THE ACCIDENT.

MR. HILLSMAN: YOUR HONOR, JUST TO MAKE A RECORD, I REFER THE WITNESS TO PAGE 83 LINE 25 THROUGH 85 LINE 3 OF THE DEPOSITION.

MR. KOELZER: WE DO NOT HAVE TO TAKE UP THE TIME OF THE JURY –

MR. HILLSMAN: I WON'T TAKE UP MUCH OF IT.

THE COURT: GO AHEAD. IT SEEMS USELESS. YOU HAVE EXPLAINED THE RECOLLECTION. IF YOU WANT TO DO IT, GO AHEAD.

MR. HILLSMAN: IN THE INTEREST OF TIME, WITH THE COURT'S RECOMMENDATION, I WON'T BOTHER WITH IT THIS TIME.

Q. LET'S TURN OUR ATTENTION TO THE DAY OF THE ACCIDENT.

DID YOU RIDE DOWN TO THE DIVE SITE WITH MR. HOEFLICH ON THE MORNING OF THE ACCIDENT?

A. YES.

Q. HAD YOU AND HE COME PREPARED TO STAY ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. YOU WERE TOLD THAT THE JOB WAS GOING TO LAST A PERIOD OF DAYS, WERE YOU NOT?

A. THREE OR FOUR DAYS.

[243] Q. DID YOU COME PREPARED TO ACTUALLY LIVE ABOARD THE CAROLYN DURING THOSE DAYS?

A. YES.

Q. HOW ABOUT MR. HOEFLICH, WAS IT HIS INTENTION TO LIVE ABOARD THOSE THREE OR FOUR DAYS?

A. I BELIEVE SO.

Q. SIR, I BELIEVE THE EVIDENCE WILL SHOW, OR HAS ALREADY SHOWN, YOU ATTENDED A DIVE BRIEFING EARLY IN THE MORNING ON SHORE WITH MR. HANSON.

A. YES.

Q. AND MR. HANSON SHOWED YOU THE VIDEOTAPE?

A. YES.

Q. FOLLOWING THE BRIEFING, YOU AND MR. HANSON AND THE RESET OF THE TEAM WENT OUT TO THE ARCTIC CAROLYN?

A. YES.

Q. ED THOMAS HAD NOT BEEN IN THAT BRIEFING?

A. NO, HE WASN'T.

Q. ONCE YOU GOT ABOARD THE CAROLYN –

I BELIEVE THE EVIDENCE WILL SHOW THAT OCCURRED AROUND 9:30 IN THE MORNING. DOES THAT SOUND RIGHT?

A. ABOUT.

Q. DIVE OPERATIONS DIDN'T BEGIN UNTIL APPROXIMATELY 1:00; IS THAT CORRECT?

A. SOUNDS ABOUT RIGHT.

Q. DID YOU HELP SET UP THE DIVE EQUIPMENT?

A. YES.

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[258] MR. HILLSMAN: WHICH DIVE SCHOOL DID YOU ATTEND?

A. DIVERS TRAINING ACADEMY IN FORT PIERCE, FLORIDA.

Q. WHEN DID YOU ATTEND THERE?

A. I THINK I STARTED IN SEPTEMBER OF '77.

Q. WHEN DID YOU LEAVE THAT SCHOOL?

A. DECEMBER OF '77.

Q. DID YOU COMPLETE THE PROGRAM THERE?

A. YES.

Q. WHAT DID THE PROGRAM TRAIN YOU FOR, COULD YOU TELL US?

A. BASICALLY THEY GIVE YOU A DIPLOMA WHERE YOU CAN GO INTO THE INDUSTRY. THEY

GIVE YOU A LITTLE HANDS-ON FOR AIR DIVING, MIXED GAS. NOT REALLY INVOLVED; JUST ENOUGH TO GET YOU OUT THERE.

Q. AND DID YOU RECEIVE ANY WATERBLASTER TRAINING WHILE YOU WERE AT FORT PIERCE?

A. NO.

Q. DID YOU RECEIVE ANY TRAINING IN HAND-JETTING?

A. NO.

Q. IN YOUR EXPERIENCE, IS THE USE OF EQUIPMENT LIKE HAND-JETTING AND WATERBLASTERS GENERALLY TRAINING WHICH YOU ARE SUPPOSED TO ACQUIRE ON THE JOB?

A. YES.

Q. FOR WHOM DID YOU FIRST GO TO WORK IN THE [259] DIVE INDUSTRY?

A. MARTECH.

Q. AND DID YOU REMAIN STEADILY EMPLOYED WITH MARTECH THROUGHOUT YOUR EMPLOYMENT IN THE DIVE INDUSTRY, OR DID YOU WORK FOR OTHER EMPLOYERS?

A. IN THE GULF OF MEXICO, PRIMARILY MARTECH. WHEN I CAME OUT TO CALIFORNIA IT WAS, I'D HAVE TO SAY, AROUND 99 PERCENT MARTECH.

Q. WHEN DID YOU COME TO CALIFORNIA?

A. I BELIEVE THAT WAS IN '85. AROUND THERE.

Q. AND WHEN YOU WORKED FOR MARTECH, WHAT TYPES OF WORK DID YOU DO FOR THEM? WHAT WERE YOUR JOBS WITH MARTECH?

A. BOTH IN THE GULF AND IN CALIFORNIA?

Q. LET'S TALK ABOUT CALIFORNIA. FOR EXAMPLE, DID YOU EVER WORK IN THE SHOP?

A. YES. LOADING OUT JOBS, WORKING ON SOME OF THEIR EQUIPMENT.

Q. YOU WERE PRESENT WHEN JOHN SABO TESTIFIED?

A. YES.

Q. HE TOLD US THAT HE WORKED FOR MARTECH AS A DIVER/MECHANIC.

A. YES.

Q. YOU RECALL THAT HE INDICATED HE WORKED STEADILY FOR THE COMPANY IN THE SHOP BETWEEN DIVE JOBS. WAS THAT YOUR EXPERIENCE?

A. NO.

Q. DID YOU REMAIN STEADY FOR MARTECH ON A

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[264] OR TED ROCHE.

Q. AND WHAT DID THEY TELL YOU ABOUT THE FIRST PHASE OF THE POINT LOMA PROJECT?

A. THEY SAID WE WERE GOING TO GO OUT THERE AND GET SOME MEASUREMENTS ON THE END PIECE. THE ENGINEERS NEEDED IT, I GUESS, FOR THE COMING WORK.

Q. DID THEY TELL YOU HOW LONG THEY EXPECTED THAT PHASE OF THE WORK TO LAST?

A. I WAS TOLD AROUND FOUR DAYS.

Q. DID THEY TELL YOU WERE THEY WERE GOING TO BE PERFORMING THAT WORK, FROM WHICH VESSEL?

A. THE ARCTIC CAROLYN.

Q. HAD YOU WORKED ABOARD THE ARCTIC CAROLYN BEFORE?

A. YES.

Q. AND WAS IT YOUR INTENTION TO LIVE ABOARD THE ARCTIC CAROLYN DURING THE FOUR DAYS?

A. YES.

Q. IS THE ARCTIC CAROLYN EQUIPPED WITH GALLEY FACILITIES AND LIVING FACILITIES?

A. YES.

Q. DID YOU BRING DIVE GEAR WITH YOU WHEN YOU WENT TO SAN DIEGO TO LIVE ABOARD THE ARCTIC CAROLYN FOR THE FIRST PHASE?

A. YES. WHEN I GOT DOWN TO OXNARD, I WAS INTENDING TO RIDE IT DOWN, BUT JOHN SAID HE WAS GOING TO DRIVE.

Q. WHERE WAS SHE BIRTHED [sic] WHEN YOU HELPED [265] MOBILIZE HER?

A. PORT HUENEME.

Q. ON THE SANTA BARBARA CHANNEL, NORTH OF SAN DIEGO?

A. YES.

Q. HOW DID THE ARCTIC CAROLYN GET FROM PORT HUENEME TO SAN DIEGO?

A. THEY STEAMED.

Q. WAS IT YOUR INTENTION TO MAKE THAT TRIP ABOARD THE ARCTIC CAROLYN INITIALLY?

A. ORIGINALLY, YES.

Q. WHAT CHANGED THAT?

A. JOHN SAID HE WANTED HIS VEHICLE DOWN THERE. I OPTED TO RIDE WITH HIM.

Q. WHEN MR. THOMAS AND MR. ROCHE FIRST CONTACTED YOU ABOUT THE POINT LOMA PROJECT, DID THEY TELL YOU HOW LONG THE OVERALL JOB WAS PLANNED TO LAST?

A. TOTAL JOB?

Q. TOTAL JOB.

A. OVER A YEAR.

Q. DID THEY TELL YOU HOW LONG THEY EXPECTED YOU TO WORK ON THE OVERALL JOB?

A. I EXPECTED TO BE ON IT THE LENGTH OF THE JOB.

MR. KOELZER: OBJECTION. THAT IS NOT THE QUESTION.

THE COURT: SUSTAINED.

[266] MR. HILLSMAN: Q. DID MR. THOMAS OR MR. ROCHE TELL YOU HOW LONG THEY EXPECTED YOU TO WORK ON THAT PROJECT?

A. I WOULD HAVE TO SAY YES, BECAUSE I EXPECTED TO BE ON IT.

Q. LET ME PUT IT TO YOU THIS WAY. WHEN YOU FIRST LEARNED THAT YOU WERE GOING TO BE WORKING ON THE POINT LOMA PROJECT AND YOU WERE AWARE IT WAS IN SAN DIEGO, –

A. YES?

Q. – YOU WERE TOLD IT WAS ABOUT A YEAR?

A. YES.

Q. DID YOU ASK MR. THOMAS OR MR. ROCHE WHETHER YOU SHOULD CONSIDER MOVING TO SAN DIEGO WITH YOUR WIFE?

A. YES. EARLIER, BEFORE, WHEN WE WERE TALKING ABOUT THE JOB, I ASKED TOM ABOUT IT. SUE AND I WERE DECIDING WHAT TO DO. IT WAS A LONG TIME TO BE AWAY FROM HOME. WE THOUGHT IT WOULD BE A GOOD IDEA TO RENT A PLACE. I THINK THAT WAS ONE OF THE REASONS I RODE WITH JOHN, TO GET A PAPER AND SEE WHAT WAS AVAILABLE AS FAR AS RENT. I MENTIONED IT TO TOM, IF HE PLANS ON HAVING ME ON THE JOB THE LENGTH OF IT, IF SUE AND I SHOULD MOVE. IN THE END, HE SAID PLAN ON IT.

Q. DID HE SAY IT WOULD BE A GOOD IDEA FOR YOU TO RENT SOMEPLACE IN SAN DIEGO?

A. YES.

* * *

[300] Q. DID YOU CONSIDER WHETHER THIS WOUND MIGHT BE AN INJECTION WOUND?

A. WELL, I – YEAH, I PROBABLY THOUGHT IT WAS AN INJECTION WOUND BECAUSE OF THE NATURE OF THE TOOL.

Q. AS YOU USE THAT TERM, "INJECTION WOUND," WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT YOU HAVE IN MIND.

A. THAT WOULD BE AN INJURY CAUSED BY A DEVICE THAT HAD DEVELOPED A LOT OF PRESSURE AND THAT ACTUALLY CAUSED THE WOUND.

Q. LOOKING BACK IN YOUR OWN STATE OF MIND AT THE TIME WHEN YOU WERE CALLED UPON TO TREAT GIL, REALIZING IT WAS AN INJECTION WOUND, REALIZING HE WAS WORKING IN CONTAMINATED WATER, DID YOU CONSIDER THE WATERBLASTER MIGHT HAVE INJECTED SEWERAGE OR FECES OR CONTAMINANTS INTO THE FOOT ITSELF?

A. YES.

Q. NOW, GIL ARRIVED ON DECK INSIDE THE DIVE STAGE?

A. YEAH, I'M PRETTY SURE WE HAD A DIVE STAGE THERE.

Q. AGAIN REFERRING TO EXHIBIT 9, WE ARE TALKING ABOUT THE DIVE STAGE HERE?

A. THAT COULD BE IT.

Q. AFTER GIL CAME FROM THE DIVE STAGE, DID YOU HELP HIM INTO THE DECOMPRESSION CHAMBER?

A. YES.

Q. DID YOU JOIN MR. HOEFLICH INSIDE THE

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[334] A. YEAH, I HAD JUST PURCHASED MY SECOND URCHIN BOAT.

Q. HOW MUCH DID THAT COST?

A. TO SET IT ALL UP? OR THE BOAT ITSELF?

MR. KOELZER: OBJECTION; NO RELEVANCY.

THE COURT: SUSTAINED.

MR. HILLSMAN: I AM OFFERING TO PROVE THIS WAS A MAN WHO HAD SPENT A GOOD DEAL OF MONEY AND HAD EVERY INTENTION OF STAYING IN THE DIVE BUSINESS.

THE COURT: THAT HAS NOTHING TO DO WITH THIS.

MR. HILLSMAN: THIS REQUIRED A GOOD DEAL OF MONEY.

THE COURT: DIFFERENT LINE OF WORK.

MR. HILLSMAN: EXACTLY. HE CAN NO LONGER DO EITHER.

THE COURT: OBJECTION IS SUSTAINED.

MR. HILLSMAN: HAD YOU EVER WORKED IN THE SALVAGE DIVING BUSINESS AS OF THE DAY OF THE ACCIDENT?

A. YES.

Q. WHEN HAD YOU LAST WORKED IN THE SALVAGE DIVING BUSINESS?

A. IT WAS A JOB IN BARCELONA JUST BEFORE THE WEDDING, PROBABLY ABOUT THREE OR FOUR MONTHS BEFORE THE ACCIDENT.

Q. FOR WHOM HAD YOU WORKED ON THAT JOB?

A. IT WAS A GENTLEMAN UP IN VANCOUVER, WASH – [335] CANADA, WILLIAM BOWMAN.

Q. HOW LONG WERE YOU ENGAGED IN THAT PROJECT IN BARCELONA ?

A. I THINK ABOUT A MONTH-AND-A-HALF. I HAD TO CUT IT SHORT AND GET BACK TO THE WEDDING.

Q. THIS WASN'T FOR MARTECH, I GATHER.

A. NO, IT WASN'T.

Q. HAD YOU NOT BEEN INJURED, HAD YOU HOPED TO CONTINUE WORKING IN MR. BOWMAN'S BUSINESS?

A. OH, YES.

Q. WHY IS THAT?

A. PRETTY LUCRATIVE. A LOT OF FUN, TOO. IT IS REALLY GOOD EXPERIENCE.

Q. AND DID THE WORK YOU DID FOR MR. BOWMAN INVOLVE DIVING?

A. YES.

Q. HAD YOU EXPECTED TO CONTINUE TO DIVE FOR MR. BOWMAN BUT FOR YOUR INJURY?

A. YES.

THE COURT: MR. HILLSMAN, I AM GOING TO INVITE A FURTHER OFFER FROM YOU AS TO THE URCHIN BUSINESS. HE IS NOT BEING HIRED TO DO THAT, BUT DOING IT FOR HIS OWN ACCOUNT. DOES IT INVOLVE, NECESSARILY, DIVING BY HIM?

MR. HILLSMAN: OH, YES, SIR.

THE COURT: I WILL PERMIT TESTIMONY ALONG THOSE LINES.

MR. HILLSMAN: Q. LET'S RETURN TO THE

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[398] VOLUME III

December 14, 1994

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[409] Q. WERE YOU AND MR. THOMAS THE ONES WHO CHOSE GIL FOR THE PROJECT?

A. YES.

Q. FOR HOW LONG HAD YOU KNOWN GIL HOEFLICH?

A. PROBABLY MID-EIGHTIES.

Q. YOU AND HE HAD WORKED TOGETHER AT MARTECH?

A. YES.

Q. WORKED OFFSHORE TOGETHER?

A. YES.

Q. HAD HE WORKED UNDER YOUR SUPERVISION?

A. AT TIMES.

Q. DID YOU EVER WORK UNDER HIS?

A. MAYBE AS AN EQUAL, BOTH DIVERS.

Q. WOULD YOU AGREE THAT GIL HOEFLICH WAS ONE OF YOUR TOP DIVERS IN SEPTEMBER OF '92?

A. THAT IS CORRECT.

Q. WAS HE ONE OF THE MOST SENIOR MEMBERS?

A. ON THAT DIVE TEAM? AS FAR AS LENGTH OF SERVICE TO MARTECH? OR IN THE FIELD?

Q. SENIORITY IN TERMS OF SERVICE TO MARTECH.

A. CORRECT.

Q. WOULD YOU AGREE THAT YOU THOUGHT GIL WAS A VERY CAPABLE HAND?

A. YES.

Q. WOULD YOU AGREE THAT YOU THOUGHT GIL WAS A SAFE DIVER?

A. THAT IS CORRECT.

Q. IN THE PAST YOU HAD PERSONALLY NAMED HIM [410] DIVING SUPERVISOR ON MARTECH JOBS ON PROBABLY MORE THAN 20 OCCASIONS, HAD YOU NOT?

A. CLOSE TO THAT.

Q. A DIVING SUPERVISOR IS THE MOST RESPONSIBLE POSITION ON ANY DIVE TEAM?

A. UNLESS THERE IS A TWO-SHIFT OPERATION, WHERE THE SUPERINTENDENT WOULD SUPERCEDE HIM.

Q. ON MOST OF THE JOBS YOU SENT GIL ON, IT WAS A ONE-MAN OPERATION WHERE HE WAS ESSENTIALLY IN CHARGE?

A. TO THE BEST OF MY RECOLLECTION.

Q. WAS HE REPUTED TO MANSON AS ONE OF YOUR TOP DIVERS; DO YOU RECALL MAKING THAT STATEMENT?

A. I BELIEVE SO.

Q. NOW, LET'S TALK A MINUTE ON HOW MARTECH HIRED ITS DIVERS.

AS GENERAL EMPLOYER FOR THE COMPANY, YOU WERE A PERMANENT EMPLOYEE, WERE YOU NOT?

A. THAT IS CORRECT.

Q. YOU STAYED ON, PROJECT IN PROJECT OUT?

A. THAT IS CORRECT.

Q. WAS THAT ALSO TRUE OF YOUR DIVERS?

A. WE HAD – THE DIVERS WERE PAID -- NONE WERE IN SALARIED A POSITION. THEY WERE PAID THE DAYS AND HOURS THEY WORKED.

Q. BASICALLY, THE DIVERS WERE HIRED ON A PROJECT-BY-PROJECT BASIS; ISN'T THAT CORRECT?

A. YES.

[411] Q. SOME DIVERS LIKE GIL WERE HIRED AGAIN AND AGAIN, PROJECT AFTER PROJECT?

A. DEPENDING ON HIS AVAILABILITY, CORRECT.

Q. BETWEEN PROJECTS YOU DIDN'T EXPECT GIL TO STAND BY AND HOLD HIMSELF AVAILABLE FOR YOU; IF HE HAD AN OPPORTUNITY ELSEWHERE, HE COULD TAKE IT?

A. HE DID.

Q. THAT'S WHAT YOU MEANT WHEN YOU SAID DEPENDING ON AVAILABILITY?

A. THAT IS CORRECT.

Q. LET'S SHIFT AND TALK ABOUT PRE-JOB PLANNING ON THE PROJECT.

YOU ARE FAMILIAR, ARE YOU NOT, WITH THE MARTECH CORPORATE SAFETY PROGRAM?

A. YES, SIR.

Q. YOU ARE AWARE THAT THAT REQUIRES MARTECH TO APPOINT A PROJECT SAFETY COMMITTEE?

A. COMMITTEE? OR OFFICER?

Q. SAFETY COMMITTEE.

A. NO, I DON'T REMEMBER THAT.

Q. LET'S SEE IF I CAN REFRESH YOUR RECOLLECTION.

I SHOW YOU PAGE 22 FROM THE MARTECH CORPORATION SAFETY PLAN, EXHIBIT 7. IT SPEAKS OF A PROJECT SAFETY COMMITTEE.

DO YOU RECALL NOW THAT THE SAFETY PLAN REQUIRED A PROJECT SAFETY COMMITTEE APPOINTED?

A. YES.

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[433] Q. WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT HE TOLD YOU AT THAT TIME.

A. GIL WAS EXTREMELY CONCERNED BECAUSE THE INJURY WAS MORE SEVERE THAN WE HAD ANTICIPATED BECAUSE OF THE POTENTIAL INFECTION AND THAT THEY WERE TALKING ABOUT POTENTIALLY HAVING TO DO SERIOUS THINGS TO HIS FOOT.

Q. INDEED, GIL TOLD YOU THEY WERE TALKING ABOUT AMPUTATING HIS FOOT?

A. CORRECT.

Q. DID YOU TALK TO DR. CHEW THE MORNING HOURS OF SEPTEMBER 10, 1992?

A. I WILL HAVE TO REFER TO THIS. I TALKED TO MANY DOCTORS.

Q. PAGE 3, THE ENTRY 9-10-92, A.M., WOULD YOU READ THAT ENTRY TO THE JURY, PLEASE.

A. (READING:) CALLED HOSPITAL, TALKED TO NURSE, DR. TODD LINCOLN WILL CALL ME BACK.

I GOT DR. CHEW'S NUMBER, 619 NUMBER.

I GOT NOTES: BLEW FECES INTO THE FOOT, DR. TODD LINCOLN, LOWER HALF OF THE FOOT SPLIT, ALL OF THE TENDONS AND MUSCLES, RAW FECES INJECTED INTO THE – INTO BLOOD STREAM, INTO TISSUE, AND AT THIS POINT IS INFECTED TO THE BONE.

Q. THE SAME MORNING AT ABOUT 1130 HOURS, DID YOU RECEIVE A REPORT FROM DR. LINAWEAVER?

A. YES.

Q. WHAT DID THE DOCTOR TELL YOU?

[434] A. (READING:) DR. LINAWEAVER HAD TALKED TO DR. NEUMAN, DISASTEROUS INJURY TO THE FOOT, INTO THE BASE OF THE FOOT, ORTHOPEDIC STAFF WORKING ON INJURY, CHANCES OF SAVING THE FOOT IS MIRACULOUS.

Q. NOW, AS MARTECH'S WEST COAST DIVISION GENERAL MANAGER, DID YOU INVESTIGATE THIS ACCIDENT ON BEHALF OF THE COMPANY?

A. YES.

Q. DID ANYONE ASSIST YOU IN THAT INVESTIGATION?

A. I WOULD HAVE BEEN ASSISTED BY TOM THOMAS.

Q. DID YOU EVER SPEAK TO THE WITNESSES?

A. YES.

Q. DID YOU SPEAK TO ED THOMAS?

A. YES.

Q. DID YOU LEARN WHAT GIL WAS DOING AT THE TIME OF THE ACCIDENT?

A. YES.

Q. DID YOU LEARN THAT HE WAS USING THE WATERBLASTER GUN WE HAVE MARKED AS EXHIBIT 18?

A. YES.

Q. DID YOU EXAMINE THE GUN YOURSELF?

A. YES.

Q. WHAT DID YOU LEARN ABOUT MR. HOEFLICH'S FOOTWEAR?

A. HIS FOOTWEAR?

Q. CORRECT.

A. HE WAS WEARING – I BELIEVE HE WAS WEARING

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[583] VOLUME IV

December 15, 1994

* * *

[592] A. YES.

Q. THAT WAS A WEEK AFTER HIS INITIAL SURGERY?

A. YES, THEY WERE WORRIED ABOUT SEPSIS SETTING IN.

Q. WHEN DID MR. HOEFLICH TURN THE CORNER ON THE DANGER OF AMPUTATION, AS YOU RECALL?

A. PROBABLY TWO TO THREE WEEKS AFTER HIS INJURY, WHEN WE FELT IT WASN'T GOING TO BE IN DANGER.

Q. YOU SAID YOU AND THE STAFF WERE WORRIED HE WOULD BECOME SEPTIC. COULD YOU EXPLAIN.

A. BECAUSE OF THE INJURY HE SUSTAINED, HE – AND WHERE IT HAPPENED, WHERE HE WAS, RAW SEWERAGE, THE INJURY BLEW A HOLE RIGHT THROUGH HIS FOOT. AND IF IT WAS IN SEWERAGE, IT COULD GO INTO THE SYSTEM, MAKING IT – GETTING INFECTION THROUGHOUT HIS ENTIRE BODY.

Q. YOU WERE AWARE MR. HOEFLICH WAS RECEIVING MASSIVE DOSES OF ANTIBIOTICS?

A. YES.

Q. NOTWITHSTANDING HIS ANTIBIOTICS, THERE WAS ASTILL AN ONGOING CONCERN HE MIGHT BECOME SEPTIC?

A. YES.

Q. HOW LONG DID THAT CONCERN PERSIST?

A. AS I SAY, THREE WEEKS OR FOUR WEEKS AFTER INITIAL INSULT.

Q. HOW MANY DAYS A WEEK DO YOU TYPICALLY WORK AT THE HOSPITAL?

A. WE WORK USUALLY FIVE DAYS A WEEK. AND [593] SOMETIMES SATURDAY I COVER FOR HYDROTHERAPY.

Q. ORDINARILY DO YOU WORK SUNDAYS?

A. NO.

Q. DID YOU VIOLATE THAT FOR MR. HOEFLICH?

A. YES.

Q. WHY?

A. BECAUSE I WAS CONCERNED ABOUT HIS LOSING HIS FOOT, AND I DIDN'T WANT HIM TO LOSE IT.

Q. YOU SAY YOU GIVE PATIENTS WHIRLPOOL THERAPY. DID YOU DO THAT FOR GIL?

A. YES.

Q. HOW MANY TIMES A DAY?

A. TWICE A DAY.

Q. IS THAT A PAINFUL EXPERIENCE FOR A PERSON LIKE MR. HOEFLICH?

A. NOT NECESSARILY. USUALLY, WHEN WE HAVE HYDROTHERAPY PATIENTS, AS THE WOUND GETS BETTER, IT IS NOT AS PAINFUL. IN THIS CASE, IT WAS. HE – THE PAIN WAS JUST INCREDIBLE.

Q. LET'S TALK ABOUT THE WHIRLPOOL JUST A MINUTE. FIRST OF ALL, WHAT SOLUTION DO YOU BATHE THE FOOT IN? IS IT FRESH WATER? SALT WATER?

A. IT DEPENDS ON THE WOUND. IF IT IS INFECTED, WE LIKE TO START WITH BETADINE, WHICH IS AN ANTIBIOTIC, TO KIND OF KILL ORGANISMS GROWING. AS IT GETS BETTER, WE PUT IT IN DAKINS, DRUGS SO IT CAN GRANULATE. ONCE WE SEE VIABLE FLESH, WE PUT IT IN SALINE BECAUSE IT IS CLOSE TO THE SOLUTION THE BODY

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[724] VOLUME V

December 19, 1994

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[849] MR. THOMAS?

A. PROBABLY SINCE AROUND '77, '78.

Q. HAVE YOU HAD A CHANCE TO WORK WITH HIM OFFSHORE A GOOD DEAL?

A. A GOOD DEAL.

Q. WOULD YOU AGREE THAT IN YOUR OPINION GIL IS A VERY GOOD DIVER?

A. YEAH, GIL IS GOOD IN THE WATER.

Q. WOULD YOU AGREE HE ENJOYS A GOOD REPUTATION IN THE TRADE?

A. YES.

Q. WOULD YOU AGREE HE IS A SAFETY-CONSCIOUS DIVER?

A. I WOULD AGREE, YEAH.

Q. LOOKING BACK ON EVENTS, YOU HAD NO CRITICISMS WITH GIL HOEFLICH AT ALL, DID YOU?

A. NONE.

Q. IF GIL WOULD BE WILLING TO WORK DOING DIVING, WOULD YOU BE GLAD TO HAVE HIM ON A FIXED GAS DIVE TEAM?

A. YES.

Q. YOU REMAINED ON THIS PROJECT UNTIL THE END OF THE JOB?

A. YES.

Q. IN FACT, SO DID ALL OF THE OTHER DIVERS ON THE TEAM, MR. MITTRY, MR. HANSON, MR. WELLS, MR. THIELST, AND MR. THIELMANN?

A. YES.

[850] Q. DURING THAT PERIOD OF TIME, YOU AND THE OTHER DIVERS WORKED ON THE HAAKON INITIALLY?

A. INITIALLY.

Q. DO YOU RECALL WHAT PERIOD OF TIME YOU AND YOUR DIVE TEAM WORKED ON THE HAAKON?

A. LATER IN THE YEAR, I BELIEVE NOVEMBER, DECEMBER.

Q. HOW LONG DID YOU CONTINUE TO WORK ON THE HAAKON?

A. MYSELF, THAT WAS IT, NOVEMBER AND DECEMBER. IT WAS BEFORE THE END OF THE YEAR, I BELIEVE.

Q. DURING THE PERIOD YOU WORKED ON THE HAAKON, WERE YOU WORKING FIVE, SIX, SEVEN DAYS A WEEK?

A. SIX, AS I RECALL.

Q. HOW MANY HOURS A DAY?

A. TWELVE-HOUR SHIFTS.

Q. DAY AFTER DAY AFTER DAY; CORRECT, SIR?

A. I BELIEVE SO. SIX DAYS A WEEK.

Q. AFTER YOUR ASSIGNMENT TO THE HAAKON, YOU THEN JOINED THE BETTY L?

A. THAT IS CORRECT.

Q. AS DID MR. MITTRY, MR. HANSON, MR. WELLS, MR. THIELST, AND MR. THIELMANN?

MR. KOELZER: OBJECT TO THE FORM, YOUR HONOR. IT HAS A CERTAIN CONNOTATION WHICH IS INACCURATE AND INAPPROPRIATE.

THE COURT: OBJECTION IS OVERRULED.

MR. HILLSMAN: Q. AS DID MR. MITTRY, [851] MR. HANSON, MR. WELLS, MR. THIELST, MR. THIELMANN; CORRECT?

A. YES.

Q. AND YOU ALL REMAINED ON THE BETTY L FOR THE DURATION OF THE PROJECT?

A. YES.

Q. DURING THAT PERIOD OF TIME YOU WORKED SIX DAYS A WEEK?

A. I BELIEVE SO.

Q. TWELVE HOURS A DAY?

A. ON THE BETTY L, I WORKED WHEN THE BELL WAS IN THE WATER. WHEN THE BELL WAS NOT, THEY SENT ME OFF, TO SAVE MONEY.

Q. MR. THIELST MR. MITTRY, MR. WELLS –

THE COURT: WE KNOW WHO YOU ARE TALKING ABOUT. WE DON'T NEED THE RITUALISTIC STRING OF NAMES ANYMORE.

MR. HILLSMAN: Q. THE DIVE TEAM.

A. YES.

Q. DAY AFTER DAY?

A. YES.

Q. TWELVE HOURS A DAY?

A. YES.

MR. HILLSMAN: IF WE COULD HAVE COUNSEL STIPULATE THAT THE HAAKON AND BETTY L ARE COAST GUARD DOCUMENTED VESSELS, IT WILL SAVE TIME.

MR. KOELZER: I WILL TAKE IT UP AT RECESS.

MR. HILLSMAN: THIS WOULD BE THE POINT I

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[883] THE COURT: YOU MAY CONTINUE.

MR. HILLSMAN: AT THIS TIME I WOULD LIKE –

THE COURT: THE OBJECTION IS OVERRULED. UNLESS THERE IS A DESIRE TO HAVE THE DOCUMENTS AUTHENTICATED, WE WILL RECEIVE THEM IN EVIDENCE.

(PLAINTIFF'S EXHIBITS 40 THROUGH 44 WERE MARKED FOR IDENTIFICATION AND RECEIVED IN EVIDENCE.)

MR. KOELZER: I AM NOT TALKING ABOUT AUTHENTICITY.

THE COURT: THEY ARE RECEIVED IN EVIDENCE.

MR. KOELZER: IT IS RELEVANCY THAT IS THE PROBLEM.

MR. HILLSMAN: WE MOVE 42, 43, AND 44.

THE COURT: PROCEED.

MR. HILLSMAN: Q. LESS [sic] TALK ABOUT THE ARCTIC CAROLYN. THIS IS THE DIVE VESSEL AT THE SITE ON THE DAY OF THE ACCIDENT.

A. THAT IS CORRECT.

Q. ACCORDING TO HER COAST GUARD PAPERS, THE ARCTIC CAROLYN IS A POWERED VESSEL, ENGINE AND PROPELLERS?

A. THAT IS CORRECT.

Q. INDEED, THE ARCTIC CAROLYN WAS LOADED FOR THIS JOB IN PORT HUENEME?

A. YES.

Q. SHE SAILED UNDER HER OWN POWER?

A. YES.

Q. SHE TRANSPORTED ALL OF THE MARTECH DIVE [884] EQUIPMENT WITH HER FROM PORT HUENEME TO POINT LOMA?

A. YES.

Q. THE DIVE GEAR, THE DECOMPRESSION CHAMBER, THE WATERBLASTERS, DIVE STAGE, ALL THAT?

A. YES.

Q. IN ADDITION TO TRANSPORTING THE GEAR, SHE TRANSPORTED YOU FROM PORT HUENEME TO POINT LOMA?

A. YES.

Q. YOU INTENDED TO LIVE ABOARD THE ARCTIC CAROLYN DURING THIS PHASE OF THE PROJECT?

A. YES.

Q. THE ARCTIC CAROLYN WAS EQUIPPED WITH LIVING FACILITIES?

A. YES.

Q. THERE WAS A GALLEY ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. LIVING QUARTERS ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. TOILET FACILITIES, OR A HEAD?

A. YES.

Q. SHE IS EQUIPPED WITH LIFE-SAVING EQUIPMENT, LIFE RINGS?

A. YES.

Q. HORIZON COURSE?

A. YES.

Q. AND RADIO AND RADAR; CORRECT?

A. YES.

[885] Q. WOULD YOU ALSO AGREE THAT SHE HAS A MOLDED OR RAKED BOW?

A. YES.

Q. AFTER DIVING OPERATIONS COMPLETED ABOARD THE ARCTIC CAROLYN, THE DIVE TEAM MOVED TO THE HAAKON?

A. YES.

Q. I AM HOLDING A PICTURE OF THE HAAKON?

A. YES.

Q. YOU AND THE OTHER MARTECH DIVERS OUTFITTED THE HAAKON FOR WORK ON THIS PROJECT AT NATIONAL CITY, DID YOU NOT?

A. YES.

Q. YOU SET UP THE DIVE STATION ABOARD THE HAAKON?

A. YES.

Q. INDEED, IS THIS WHERE THIS PHOTOGRAPH WAS TAKEN, AT THE NATIONAL CITY YARD?

A. YES.

Q. DOES IT SHOW THE DIFFERENT EQUIPMENT YOU AND THE DIVE TEAM SET UP ABOARD THE HAAKON?

A. YES. THE BLUE AND WHITE GEAR ON THE STERN.

Q. ALL OF THE GEAR HERE?

A. YES.

Q. THE HAAKON, UNLIKE THE ARCTIC CAROLYN, IS NOT EQUIPPED WITH AN ENGINE?

A. NO.

Q. SHE IS TYPICALLY TOWED BY TUG?

[886] A. YES.

Q. ONCE ON SITE AND SHE HAS HER ANCHORS IN PLACE, SHE CAN MOVE BACK AND FORTH ON THE ANCHORS BY MEANS OF WINCHES; IS THAT CORRECT?

A. YES.

Q. SHE HAS DIESEL-POWERED ANCHOR WINCHES?

A. I BELIEVE SO, YES.

Q. CARRIES ON HER DIESEL FUEL?

A. ONLY IN THE EQUIPMENT. I DON'T BELIEVE THERE IS FUEL STORAGE TANKS.

Q. FUEL FOR THE EQUIPMENT ABOARD THE HAAKON?

A. IN THE FUEL TANKS OF THE EQUIPMENT.

Q. AFTER THE DIVE EQUIPMENT, THE BLUE AND WHITE EQUIPMENT WE SEE IN EXHIBIT 40, WAS LOADED ABOARD THE HAAKON IN NATIONAL CITY, SHE TRANSPORTED THAT EQUIPMENT OUT TO THE DIVE SITE; IS THAT CORRECT?

A. RIGHT.

Q. ONCE SHE WAS ON THE DIVE SITE, SHE WAS USED IN ADDITION FOR DIVING OPERATIONS, FOR SCREEDING OPERATIONS?

A. YES.

Q. SHE TRANSPORTED THE SCREED OUT THERE, TOO, DIDN'T SHE?

A. I BELIEVE THE SCREED CAME OUT OF THE MATERIAL BARGE.

Q. ONCE SHE WAS ON SITE, THEY TRANSPORTED THE SCREED FROM THE POINT WHERE THE EXISTING OUTFALL ENDED TO THE TERMINUS WHERE THE EXTENSION ENDED; [887] CORRECT?

A. YES. IT WAS MOVED ALONG THE BOTTOM, YES.

Q. THAT WAS A DISTANCE OF ABOUT THREE TO FOUR MILES?

A. THREE MILES, AS I RECALL.

Q. SHE MADE MOST OF THAT DISTANCE BY CRAWLING ALONG ON HER OWN ANCHOR LINES?

A. YES.

Q. SHE WAS ACTUALLY ABLE TO PULL HERSELF THAT ENTIRE DISTANCE OVER A PERIOD OF MONTHS?

A. RIGHT. WITH VARIOUS ANCHOR SPRINTS.

Q. THE HAAKON WAS ON LOCATION OFF POINT LOMA NIGHT AND DAY; IS THAT CORRECT, SIR?

A. YES.

Q. SHE IS EQUIPPED WITH VARIOUS LIGHTS TO FACILITATE NIGHT OPERATIONS?

A. YES.

Q. AND RUNNING OR RIDING LIGHTS, PER COAST GUARD REGULATIONS, SO VESSELS IN THE AREA WILL BE ABLE TO IDENTIFY HER?

A. YES.

Q. THE HAAKON IS ALSO EQUIPPED WITH LIFE-SAVING EQUIPMENT?

A. THERE ARE LIFE RINGS.

Q. THE HAAKON HAS TOILET OR HEAD FACILITIES?

A. A TOILET.

Q. SOME RUDIMENTARY FOOD PREPARATION FACILITIES?

[888] A. NOT THE HAAKON.

YOU ARE RIGHT, THE HAAKON DOES.

Q. ALSO A CHANGING ROOM?

A. YES.

Q. IN ADDITION TO THE SCREED, THE DIVING EQUIPMENT, THE HAAKON ACTUALLY TRANSPORTED PEOPLE WHO WORKED ABOARD HER AS SHE WAS MOVING ALONG THE DIVE SITE?

A. RIGHT.

Q. NOW, AFTER OPERATIONS WERE COMPLETED ABOARD THE HAAKON, YOU MOVED ABOARD THE BETTY L; IS THAT CORRECT?

A. YES.

Q. THE BETTY L IS A LARGE 6,000-TON SEAGOING, PIPE-LAYING BARGE?

A. YES.

Q. EQUIPPED WITH A HELIPORT?

A. YES.

Q. GALLEY FACILITIES?

A. NO GALLEY FACILITIES.

Q. YOU GUYS WERE WORKING 12 HOURS A DAY?

A. YES.

Q. YOU TOOK YOUR MEALS ABOARD THE BETTY L?

A. CARRIED THEM OUT EVERY DAY.

Q. YOU EAT THOSE IN A CREW ROOM OR CHANGING ROOM?

A. WHENEVER YOU ARE WORKING.

Q. THE BETTY L WAS IN OPERATION 24 HOURS A [889] DAY?

A. YES.

Q. EQUIPPED WITH LIGHTS?

A. YES.

Q. EQUIPPED WITH RUNNING OR RIDING LIGHTS, PER COAST GUARD REGULATIONS?

A. YES.

Q. ALSO EQUIPPED WITH ANCHORS?

A. YES.

EXCUSE ME. SHE DID NOT CARRY THE ANCHORS. THE ANCHORS WERE SURGE MOORING, WHICH WAS PRE-SET ANCHORS. WE WOULD RUN A MOORING LINE OUT TO THE MOORING AND PULL IN.

Q. WHEN SHE ARRIVED AT THIS JOB SITE, SHE CARRIED HER ANCHORS DOWN FROM RIO VISTA?

A. I DON'T KNOW WHAT SHE HAD.

Q. YOU ARE AWARE THAT THE BETTY L WAS TOWED BY SEA FROM THE GOLDEN GATE ALL THE WAY DOWN TO NATIONAL CITY JUST FOR THIS PROJECT?

A. YES.

Q. AND, FORGIVE ME, DID YOU HELP RIG THE BETTY L FOR THIS JOB WHEN SHE WAS ALONGSIDE THE PIER AT NATIONAL CITY?

A. AS FAR AS INSTALLING THE DIVING SYSTEM.

Q. BACK AFT, BY THE CRANE?

A. MORE TO ONE SIDE, YES.

Q. WHEN THE BETTY L WAS DELIVERED ON SITE AT P.L.C., SHE TRANSPORTED THE DIVE EQUIPMENT WITH HER [890] ON SITE; CORRECT?

A. YES.

Q. AS WITH THE HAAKON, THE BETTY L HAS ABILITY TO MOVE BACK AND FORTH ON THE ANCHOR LINES?

A. YES.

Q. THE BETTY L DID JUST THAT FOR A DISTANCE OF SOME FOUR MILES WHILE LAYING PIPE?

A. THREE MILES.

Q. ONCE THE BETTY L WAS DELIVERED OFFSHORE, SHE REMAINED OFFSHORE SIX-AND-A-HALF MONTHS, FOR THE DURATION OF HER OPERATIONS ON THE POINT LOMA PROJECT; ISN'T THAT CORRECT?

A. I DON'T THINK THE BETTY L CAME IN. THE HAAKON DID ON OCCASION.

Q. WHEN SHE LEFT NATIONAL CITY, SHE CARRIED A FULL COMPLEMENT OF PIPE SECTIONS; IS THAT CORRECT?

A. DON'T RECALL.

Q. WE CAN CALL A WITNESS TO VERIFY THAT.

DO YOU RECALL WHETHER OR NOT THE BETTY CARRIED A ROCK SUPPLY WITH HER WHEN SHE LEFT NATIONAL CITY?

A. I DON'T RECALL.

Q. YOU DON'T REMEMBER ONE WAY OR THE OTHER?

A. I DON'T REMEMBER.

Q. THE HORSE WE HAVE BEEN HEARING SO MUCH ABOUT, THAT IS THIS LARGE PIECE OF EQUIPMENT HANGING FROM THE CRANE?

A. THAT IS CORRECT.

[891] Q. THAT WAS LOADED ABOARD AT NATIONAL CITY?

A. YES.

Q. ALSO TRANSPORTED TO THE DIVE SITE ABOARD THE BETTY L?

A. IT WAS.

Q. THE BETTY L IS EQUIPPED WITH DIESEL-POWERED ENGINES?

A. POWER-SUPPLIED ENGINES, HYDRAULIC AND ELECTRIC.

Q. SHE HAS HER OWN ELECTRICAL POWER?

A. YES.

Q. INDEED, SO DOES THE CAROLYN.

FUELED BY DIESEL-POWERED EQUIPMENT?

A. YES.

Q. THE BETTY L HAS FUEL TANKS TO SUPPLY THE DIESEL-POWERED EQUIPMENT WITH FUEL?

A. I DON'T KNOW THE FUEL ARRANGEMENTS.

Q. ON DECKS THERE ARE CHAINS AND BALER USED FOR MOORING VESSELS, ISN'T THAT RIGHT, SIR, ON BOTH THE BETTY L AND THE HAAKON.

A. THAT'S RIGHT.

Q. BOTH THE HAAKON AND BETTY L ARE EQUIPPED WITH FUEL-POWERED PERMANENT REVOLVING CRANES; IS THAT CORRECT?

A. YES.

Q. BOTH THE HAAKON AND BETTY L HAVE RADIO CALL SIGNS, THEY HAVE RADIOS ABOARD?

A. I NEVER USED THE V.H.F. WE USE TELEPHONES.

[892] Q. YOU HAD RADIO COMMUNICATIONS TO COMMUNICATE WITH THE BEACH FROM BOTH THE HAAKON AND THE BETTY L?

A. YES.

Q. HOW DID THOSE VESSELS SITUATE THEMSELVES ON SITE? HOW DID THEY KNOW THEY WERE DIRECTLY IN THE PATH OF THE PIPE-LAYING OPERATION?

A. FOLLOWED THE LASER.

Q. THEY HAD SPECIAL LASER NAVIGATION EQUIPMENT?

MR. KOELZER: OBJECTION. WORD OF ART. IT IS DECEPTIVE TO USE THAT FORM. THEY MAY HAVE HAD LASER EQUIPMENT. TO ADD THINGS IS IMPROPER SUGGESTION.

THE COURT: THE OBJECTION IS OVERRULED.

MR. HILLSMAN: Q. SO BOTH THE HAAKON AND BETTY L HAD LASER-POWERED NAVIGATION TO ASSIST THE VESSELS' CREWS TO SITUATE THEM OVER PIPE?

A. NOT ENTIRELY CORRECT. THE LASER WAS ON THE BEACH. A MAN WOULD STAND NEXT TO A HANDRAIL. WHEN THE LASER HIT HIM IN THE EYE, THEY WERE ON LINE.

Q. THOSE BARGES HAD ABILITY TO SHIFT BACK AND FORTH ON THE ANCHOR LINES UNTIL DIRECTLY ON LINE?

A. ADJUST, YES.

Q. INDEED, BEING PRECISELY IN POSITION ON LINE ABOVE THE FAIRWAY WAS PARTICULARLY IMPORTANT FOR THE OPERATION OF BOTH VESSELS?

A. WITHIN A RANGE OF EIGHT FEET, YES.

Q. NOW, WHEN SHE WAS OPERATING ON SITE, THE [893] ARCTIC CAROLYN ESSENTIALLY FUNCTIONED AS THE HOST VESSEL FOR DIVE OPERATIONS; CORRECT?

A. YES.

Q. WHEN SHE WAS FUNCTIONING ON SITE, THE HAAKON, AMONG OTHER THINGS, OPERATED AS A HOST VESSEL FOR DIVE OPERATIONS; IS THAT CORRECT?

MR. KOELZER: OBJECTION; FORM.

THE COURT: OVERRULED.

A. WE WERE DIVING FROM THE STERN OF THE HAAKON.

MR. HILLSMAN: Q. IN ADDITION TO OPERATING AS A HOST SITE FOR DIVE OPERATIONS, THE HAAKON ALSO PERFORMED SCREEDING, LAYING THE PIPE PATH; CORRECT?

A. THERE WAS VERY LITTLE. THAT WASN'T – THE TWO OPERATIONS WEREN'T SIMULTANEOUS.

Q. I UNDERSTAND.

A. THEY DID BOTH OPERATIONS, YES.

Q. THE HAAKON ALSO HELPED PERFORM THE PHASE OF THE WORK IN WHICH THE APRON IN FRONT OF THE PIPE WAS DESTROYED; IS THAT CORRECT?

A. THAT IS CORRECT.

Q. WOULD YOU DESCRIBE THAT OPERATION TO THE JURY SO WE UNDERSTAND WHAT IT ENTAILED.

A. I DON'T REMEMBER THE DIMENSIONS. THERE WAS A LARGE CEMENT GRID SET. IT WAS

SUPPOSED TO CRADLE AN EXTENSION PIPE WHEN IT WAS SET. BUT IT WAS SET IMPROPERLY. THEY DROPPED CONCRETE DOWN THROUGH A PIPE, SO IT DOESN'T DIFFUSE, TO KEY IT INTO THE [894] BOTTOM. SO IT WAS ESSENTIALLY A CONCRETE BOX FILLED, BLOCK OF CELLS FILLED, WITH CONCRETE. IT WAS A FOOT HIGH, AS I RECALL, AND WE WERE TRYING TO BREAK IT UP, AND WE WERE HOPING TO PULL IT OUT IN ONE PIECE. WE EVENTUALLY HAD TO BREAK IT AND REMOVE THE DEBRIS.

Q. ALL THAT WAS DONE WITH EQUIPMENT FROM THE DECKS OF THE HAAKON?

A. YES.

Q. THAT EQUIPMENT WAS TRANSPORTED OUT TO THE SITE AND BACK TO NATIONAL CITY ABOARD THE HAAKON?

A. NO. NOT THE TOOLS WE EVENTUALLY USED.

Q. LET ME ASK YOU THIS. LET'S TURN TO THE BETTY L.

WOULD YOU AGREE THE BETTY L WAS USED FROM TIME TO TIME AS A HOST VESSEL FOR DIVE OPERATIONS?

MR. KOELZER: OBJECTION TO THE FORM.

THE COURT: OVERRULED.

A. WE DOVE FROM THE HAAKON.

MR. HILLSMAN: Q. IN ADDITION TO THAT, SHE OPERATED AS THE PIPE-LAYING VESSEL?

A. YES.

Q. AND OPERATED AS THE TRIMMING OR ROCKING VESSEL?

MR. KOELZER: SAME OBJECTION ALL THE WAY THROUGH, YOUR HONOR.

THE COURT: OVERRULED.

A. IT ALSO DUMPED ROCK, YES.

MR. HILLSMAN: Q. ONE LAST QUESTION.

[895] WAS IT YOUR IMPRESSION THAT GIL HOEFLICH EXPECTED TO DRIVE HOME AFTER THIS ACCIDENT?

A. THAT WAS HIS IMPRESSION, YES.

Q. JOHN THIELST, HE REMAINED ABOARD THE ARCTIC CAROLYN WITH YOU THAT NIGHT, DIDN'T HE?

A. I DON'T REMEMBER. I STATED THAT.

MR. HILLSMAN: THAT'S ALL I HAVE.

RECROSS-EXAMINATION

MR. KOELZER: Q. SO WE ARE CLEAR ON A NUMBER OF POINTS, THE BETTY L AND THE HAAKON DID NOT HAVE, QUOTE, LASER NAVIGATION EQUIPMENT ON BOARD THEM, DID THEY?

A. NO.

Q. THAT'S BECAUSE, CONTRARY TO WHAT WAS SUGGESTED TO YOU IN THE QUESTION BEFORE, THEY WEREN'T IN NAVIGATION, WERE THEY?

MR. HILLSMAN: YOUR HONOR, THAT IS A TERM OF ART. OBJECTION.

THE COURT: OVERRULED. YOUR OBJECTION. HIS OBJECTION.

MR. HILLSMAN: I WANTED A RECORD.

MR. KOELZER: Q. DO YOU KNOW WHAT I MEAN BY PHRASE "IN NAVIGATION"?

A. NO.

Q. FAIR ENOUGH. I WILL BACK UP.

DID THEY MOVE AROUND, SAIL FROM POINT TO POINT, THE HAAKON AND THE BETTY L?

A. THEY FOLLOWED THE ROAD BED.

* * *

[904] MR. HILLSMAN: AT THIS TIME WE WOULD LIKE TO RECALL MR. HOEFLICH BRIEFLY.

THE COURT: YOU MAY PROCEED.

MR. HILLSMAN: AT THIS TIME WE WOULD LIKE TO RECALL MR. HOEFLICH BRIEFLY.

GILSON HOEFLICH, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION (RESUMED)

MR. HILLSMAN: Q. YOU APPRECIATE YOU ARE STILL UNDER OATH?

A. YES.

Q. YOU WERE PRESENT WHEN MR. THOMAS WAS ON THE STAND TODAY?

A. YES.

Q. DID YOU EVER TELL ED THOMAS THAT YOU WANTED TO DRIVE HOME ON THE DAY OF THE ACCIDENT?

A. NO, I DIDN'T.

Q. DID YOU HAVE A CAR ON THE DAY OF THE ACCIDENT?

A. NO. I DROVE DOWN IN JOHN THIELST'S TRUCK.

Q. YOU AND MR. THIELST HAD INTENDED TO LIVE ABOARD THE ARCTIC CAROLYN FOR THE DURATION OF THE PROJECT, HAD YOU NOT?

A. YES. I WAS ACTUALLY PLANNING ON RIDING THE CAROLYN DOWN. HE OFFERED TO DRIVE.

Q. YOU DIDN'T HAVE A CAR TO TAKE YOU BACK UP TO SANTA BARBARA THAT NIGHT?

* * *

[934] MOON, AN EXPERT IS RIGHT WHEN HE SAYS HE CAN'T. NOT OFTEN.

IN THE EVENT OF AN ADVERSE VERDICT, UNLESS WE CAN WORK OUT A STIPULATION WE WANT, AS PART OF THE TRIAL RECORD, THE FACT THERE WAS A $10,000 PAYMENT MADE.

MR. HILLSMAN: WE CAN STIPULATE.

THE COURT: THANK YOU.

MR. HILLSMAN: THAT TAKES US TO THE ISSUE OF THE PAST EMPLOYMENT HISTORY. WOULD THIS BE AN APPROPRIATE TIME TO MAKE THE MOTION ON THAT?

THE COURT: YES.

MR. HILLSMAN: AS I UNDERSTAND, THE COURT GRANTED MY MOTION TO BAR THE INFORMATION. COUNSEL GAVE ME AN OPPORTUNITY TO REVIEW THE STIPULATION. IT IS ACCURATE. IT DOES NOT DEAL WITH THE ENTIRETY OF THE PAST EMPLOYMENT HISTORY.

THE COURT: LET ME TELL YOU THE PRELIMINARY REACTION. THIS IS NOT A RULING; IT IS A STATEMENT OF ATTITUDE AT THIS POINT.

THE MATERIAL THAT COUNSEL HAS BEEN PROVIDED THUS FAR IS APPROPRIATE TO BE RECEIVED, WILL BE RECEIVED, IN EVIDENCE.

AT SOME POINT, THE MATERIAL GOING BACK INTO THE PAST BECOMES SUBJECT TO BEING TOO REMOTE FROM THE FACTS IN QUESTION HERE. THAT IS THE CONCERN I HAVE, IS WHETHER THE CUTOFF IS APPROPRIATE.

MR. HILLSMAN: IN MY VIEW, THE CUTOFF IS [935] THE PLAINTIFF'S ASSIGNMENT AT THE TIME OF THE ACCIDENT.

IN THIS CIRCUMSTANCE WE TAKE THE POSITION A JONES ACT SEAMANS STATUS SINKS OR

SWIMS WITH ASSIGNMENT AT THE TIME OF THE ACCIDENT.

KEITH VS. S.S. GOLDSTONE, 81 CAL.APP.3D 699, THE LANGUAGE AT 704, IN THIS COURT. CALIFORNIA COURTS ARE OBLIGED TO FOLLOW THE NINTH CIRCUIT RULE. WHERE THERE IS A CONFLICT AMONG THE CIRCUITS, THE COURT WILL FIND THE RULE IS THAT THE FLEET SEAMAN DOCTRINE DOES NOT APPLY, THAT A SEAMAN'S STATUS IS DETERMINED SOLELY FROM ASSIGNMENT AT THE TIME OF THE INJURY.

THE CASE I WOULD CITE IS STANFIELD VS. SHELLMAKER.

THE COURT: IS THAT IN YOUR BOOK?

A. YES, 869 F. 2D 521.

THE COURT: STANFIELD AGAINST SHELLMAKER.

MR. HILLSMAN: SHELLMAKER, 869 F. 2D 525. THIS ISSUE, BY THE WAY, WAS ADDRESSED BY THE DISTRICT COURT OF HONOLULU IN A CASE KJAR, KJAR, VS. AMERICAN DIVERS. THE COURT WILL FIND THAT CITATION IN THE TRIAL BRIEF.

THE COURT: WHAT IS YOUR POSITION BASED ON, STANFIELD AND THE OTHER AUTORITIES [sic]?

MR. HILLSMAN: MY POSITION IS THAT THE COURT MUST DETERMINE THE PLAINTIFF'S JONES

ACT STATUS FROM THE FOUR CORNERS OF THE ASSIGNMENT AT THE TIME

* * *

[1172] VOLUME VIII

January 3, 1995

[1175] * * *

ISSUE, NOT ONLY THE EFFECT OF THE STATUTE, BUT ALSO THE QUESTION OF –

I HAVE A PROBLEM, MR. HILLSMAN, WITH WHETHER THERE IS EVIDENCE THAT THE INJURY WAS CAUSED BY NEGLIGENCE ON THE PART OF SEA-LAND IN ITS CAPACITY AS A SHIP OWNER.

MR. KOELZER: DO YOU MEAN MARTECH.

THE COURT: SORRY. RIGHT.

WHAT DO YOU SAY?

MR. HILLSMAN: I UNDERSTAND, YOUR HONOR.

I BELIEVE THAT THE PROPOSED INSTRUCTION WHICH WE SUBMITTED ON THE POINT CORRECTLY STATES THE LAW, AS I UNDERSTAND THE LAW.

MARTECH, AS A VESSEL OWNER, WAS UNDER A DUTY TO PROVIDE VESSEL AND TOOLS AND EQUIPMENT PRIOR TO THE COMMENCEMENT OF DIVE OPERATIONS WHICH WERE REASONABLY SAFE, IN OTHER WORDS, WHICH WOULD PERMIT AN EXPERT DIVER TO PERFORM HIS ACTIVITIES IN REASONABLE SAFETY.

THE COURT: I THINK IT IS DOUBTFUL; I AM NOT SURE I WOULD LET A VERDICT STAND ON THAT POINT.

MR. HILLSMAN: I UNDERSTAND.

THE COURT: I THINK YOU HAVE A FAIR JURY ISSUE ON JONES ACT SEAMAN STATUS. I SEE SOME DANGER THAT A JURY WILL HAVE TROUBLE WITH THAT ISSUE AND SAY, "WE ARE INSTRUCTED ON THIS 905(B), THAT ONE IS EASY, LET'S FIND NO SEAMAN STATUS ON THE JONES ACT AND INSTEAD AWARD A RECOVERY UNDER 905(B)." THAT IS

* * *

MANSON

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Attorneys for Defendants MARTECH USA, INC., POINT LOMA CONSTRUCTORS, MORRISON KNUDSEN CORPORATION, and MANSON CONSTRUCTION & ENGINEERING CO.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GILBERT HOEFLICH, Plaintiff, v. MARTECH INTERNATIONAL INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture, between Morrison-Knudsen Corp., and Manson Construction & Engineering Co., MORRISON-KNUDSEN CORP., MANSON CONSTRUCTION & ENGINEERING CO., RED & WHITE DIVING, INC., and, DOES 1 through 25, Defendants.	CASE NO. 950 673 DEFENDANT'S NOTICE OF MOTION AND MOTION TO VACATE THE "FINAL JUDGMENT AFTER APPEAL" OR, IN THE ALTERNATIVE, TO STAY ENFORCEMENT OF THE "FINAL JUDGMENT AFTER APPEAL"; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF CAROLYN J. SHIELDS Date: December 12, 1996 Time: 9:30 a.m. Place: Department 10

PLEASE TAKE NOTICE THAT defendant MARTECH USA INC. (hereinafter "defendant," or "Martech"), through Lane Powell Spears Lubersky, its attorneys of record, will on December 12, 1996, at 9:30 a.m., before this Court in Department 10, located at 633 Folsom Street, Room 414, San Francisco, California 94107-3601, move for an order to vacate the "Final Judgment After Appeal" ("Judgment") filed by plaintiff and signed by this Court. In the alternative, defendant will move for a stay of an execution on the Judgment until after a decision has been made by the Supreme Court of the United States on defendant's Petition for a Writ of Certiorari.

The motion will be made on the ground that the Judgment is void because it was prematurely entered. Specifically, the Judgment was entered prior to a decision by the court regarding plaintiff's claim for maintenance. Additionally, if plaintiff is entitled to maintenance, the Judgment was entered prior to a decision by the court regarding the amount of damages plaintiff may recover as maintenance. Until the court resolves these outstanding issues, any judgment entered in this case is premature and void. Accordingly, the court should vacate the Judgment because it was entered prior to a final resolution of all the claims made in this case.

Alternatively, defendant will request a stay of any execution on the Judgment based upon the Court's inherent authority to protect the ends of justice. In the absence of a stay, plaintiff could enforce the Judgment and thereby moot the controversy between the parties before the Supreme Court of the United States has an opportunity to rule on defendant's petition for writ of certiorari. Thus, a stay of enforcement of the Judgment is

necessary to protect defendant's right to seek review of this case by the Supreme Court of the United States.

The motion will be based on this notice of motion, on the declaration of Carolyn J. Shields, and the Memorandum of Points and Authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

DATED this 27th day of November, 1996.

LANE POWELL SPEARS
LUBERSKY LLP

By /s/ Carolyn J. Shields
George J. Koelzer
Carolyn J. Shields
Attorneys for Defendant
MARTECH USA INC.

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

I

PROCEDURAL BACKGROUND

Plaintiff brought this maritime personal injury action seeking to recover damages, which he allegedly suffered while working as a seaman. During the trial of this case, the parties stipulated that plaintiff's entitlement to maintenance[1] would be decided by the Court after the jury returned its verdict. Shields Decl. ¶ 2. After the jury returned a verdict in favor of plaintiff but before the court decided plaintiff's entitlement to maintenance, the court granted defendant's motion for JNOV ("JNOV order"), which denied plaintiff any recovery. After the verdict and before resolution of the outstanding maintenance claim and before the JNOV order, plaintiff prepared, and the trial court signed, a "Judgment on Special Verdict." This first "judgment" is nonfinal because it does not dispose of the outstanding maintenance claim.

On plaintiff's appeal from the final judgment entered on the JNOV order, defendant objected on the ground that it was, among other things, taken from a nonfinal order, the "Judgment on Special Verdict." The Court of Appeal reversed the judgment entered on the trial court's JNOV order, and the Supreme Court of California denied defendant's petition for review. As a result, the Court of

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[1] *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527, 58 S.Ct. 651, 653, 82 L.Ed. 993 (1938) (maintenance includes a seaman's right to food and lodging if he falls ill or becomes injured while in the service of the ship).

Appeal issued its remittitur and jurisdiction over this case was transferred back to the trial court. Shields Decl. ¶ 3.

Rather than pursue his claim to maintenance, plaintiff filed a second nonfinal "judgment," the "Final Judgment After Appeal," and a cost bill. Over defendant's objection, the Judgment was signed by this court. Shields Decl. ¶ 4. Defendant has responded by moving to vacate the Judgment and to strike the cost bill.

II

THE JUDGMENT IS VOID BECAUSE IT WAS PREMATURELY ENTERED

It is beyond dispute that a judgment is a final adjudication of all the claims raised in a lawsuit. Cal. Code of Civ. Proc. § 577. It is equally fundamental that a judgment may not be entered until after all the issues raised by the parties have been resolved. *City of Huntington Beach v. Superior Court of Orange County* (1978) 78 Cal.App.3d 333, 339, 144 Cal.Rptr. 236, 239 (judgment was premature when entered after a finding on liability but before a finding on damages). The courts uniformly hold that a judgment is premature and void when it is entered prior to the final resolution of all the claims raised in the lawsuit. *Trani v. R.G. Hohman Enterprises, Inc.* (1975) 52 Cal.App.3d 314, 316, 125 Cal.Rptr. 34, 35 (premature judgment was "patently void"); *Ohio Casualty Insurance Co. v. Northwest Mutual Insurance Co.* (1971) 17 Cal.App.3d 204, 207, 94 Cal.Rptr. 586, 587 (premature judgment was a nullity); *Burke v. City and County of San Francisco* (1952)

111 Cal.App.2d 314, 316, 244 P.2d 708, 710 (premature judgment was ineffective).

The rationale of *Shapiro v. Equitable Life Assurance Society* (1946) 76 Cal.App.2d 75, 98-99, 172 P.2d 725, 738, requires that the Judgment be vacated as void. In *Shapiro*, the parties agreed that the trial court would decide certain issues after the jury returned its verdict. Despite this agreement, a judgment was entered after the jury returned its verdict but before the court had ruled on the issues deferred.

In the subsequent appeal, the *Shapiro* court held:

> *Where special issues which form only a portion of the controversy between the parties to the action are submitted to a jury and remaining issues are tried by the court and findings of fact made thereon, no judgment can be entered in the case at the time the jury renders its verdict. The case has not been tried and the trial has not been concluded until the court has rendered its decision disposing of all issues submitted to it, and there is no decision until the court has passed upon the facts and drawn its conclusions thereon.*
>
> . . .
>
> *The trial of this action had not been concluded when the verdict of the jury was rendered, and the judgment entered thereon having been premature was void and of no effect.*

Id. (emphasis added). *See also Alton v. Rogers* (1954) 127 Cal.App.2d 667, 678, 274 P.2d 487, 494 (a judgment is void when it is entered prior to resolution of all issues in a case).

Like the judgment in *Shapiro,* the Judgment in this case was premature because it was entered before all of the causes of action had been decided. During the trial of this case, the parties stipulated on the record that the court would decide plaintiff's claim for maintenance after the jury returned its verdict. However the Court never decided the issue of maintenance. Because the Judgment was entered prior to a determination of plaintiff's claim for maintenance, the Judgment is void and should be vacated. 7 Witkin, *California Procedure,* Judgment, § 52 p. 489 (3d ed. 1985) (a judgment in a bifurcated trial is not enforceable unless it is entered after all the issues have been determined).

III

IN THE ALTERNATIVE, DEFENDANT REQUESTS A STAY OF EXECUTION ON THE JUDGMENT UNTIL AFTER A RULING ON ITS PETITION FOR WRIT OF CERTIORARI

This Court has the inherent authority to stay enforcement of a judgment whenever the ends of justice so require. *First National Bank of San Pedro v. Stansbury* (1931) 214 Cal. 190, 193, 5 P.2d 11, 12 (Shenk, J. dissenting). In the absence of a stay in this case, plaintiff could enforce the Judgment and thereby moot the controversy between the parties before the Supreme Court of the United States has an opportunity to rule on defendant's' petition for a writ of certiorari. Because justice requires that a party have the opportunity to fully litigate its case, enforcement of the Judgment should be stayed pending a decision on the defendant's Petition for Writ of Certiorari.

Before the Court of Appeal issued its remittitur, defendant admittedly could have moved for a stay pending decision by the Supreme Court of the United States on its petition for a writ of certiorari. California Rule of Court 25(c). However, defendant opted not to request a stay at that time because plaintiff's claim for maintenance had not been litigated. Requesting a stay in the absence of a final judgment would have been unnecessary, a waste of the parties' and the court's time, and would have delayed final determination of maintenance and final judgment in this case.

It would be a more efficient use of scarce judicial resources to simultaneously petition the Supreme Court of the United States for a writ of certiorari while litigating the maintenance issue in the trial court. Defendant did not request a stay of the issuance of the remittitur because it had no need to. The need to request a stay only arose when plaintiff filed his so-called "Final Judgment After Appeal."

That plaintiff filed the Judgment without raising the issue of maintenance was a surprise to defendant: maintenance is an element of damages traditionally sought by seamen. Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-28 (2d ed. 1994) (a seaman's right to maintenance predates medieval sea codes). If this Court decides that plaintiff has waived his right to maintenance, that waiver should not prevent defendant from exercising its right to petition the Supreme Court of the United States for a writ of certiorari.

Plaintiff's filing of the Judgment is an attempt to preempt further review of this case. If plaintiff had

intended to waive his alleged right to maintenance he might have done so at any time after the jury returned its verdict. Instead, knowing that defendant intended to petition the Supreme Court for a writ of certiorari, plaintiff filed the Judgment, waiting until the Court of Appeal had issued its remittitur to do so.

Justice requires that the defendant have the right to fully litigate this case. Accordingly, any enforcement of the Judgment should be stayed pending a determination of defendant's Petition for Writ of Certiorari.

IV
CONCLUSION

For the reasons set forth above, defendant respectfully requests that this Court vacate the judgment. In the alternative, defendant respectfully requests a stay of enforcement of the Judgment until the Supreme Court of the United States has ruled on defendant's Petition for Writ of Certiorari.

DATED: November 27, 1996

LANE POWELL SPEARS
LUBERSKY LLP

By /s/ Carolyn J. Shields
George J. Koelzer
Carolyn J. Shields
Attorneys for Defendant
MARTECH USA INC.

PLAINTIFF'S EXHIBIT 950673

TED ROCHE LOG OF INJURY

9/9/92

1355 HRS
Ed Thomas notified Ted Roche at 1:55 p.m. that Gil Hoeflich had been injured 57 minutes into a 210' dive. He was using a 10,000 psi waterblaster to remove marine growth and material from the end of an outfall pipe. Gil cut the top of his left foot caused by high pressure water.

1400 HRS
Notified Dr. Linaweaver SBMC; informed of injury; will keep him informed as we know more.

1410HRS
Ted talked to Tim Hanson of Pt. Loma Constructors; told him to jump a standby diver if necessary to check for bleeding. Tim has contacted UCSD and alerted them. Ted talked to Linaweaver got right #; will assess vitals; etc when we get him in the chamber; informed me to take precautions for shock.

1430 HRS
Paged Tom Thomas

1432 HRS
Called Bob Burcham, left message to return call ASAP.

1440 HRS
Informed Bob Burcham

1450 HRS
Sent 1st Report of Injury to Bob Burcham

1520 HRS
Informed Tom Thomas

1525 HRS
Report from Tim Hanson, Gil in chamber. Pulse is good; wrapping now direct pressure stops bleeding; not too cold; injury on top of left foot is as follows:

1 1/4" long
1/4" deep
1/4" wide

9/10/92
A.M.
Called hospital talked to nurse; Dr. Todd Lincoln will call me back. (surgeon)

Dr. Chu (619) 543-6737; blew feces into the foot; Dr. Todd Lincoln – lower half of the foot, separated all the tendons and muscle; raw feces injected into the blood stream into tissue and at this point is infected to the bone. Surgery last night, open up the foot, irrigated and cleaned; extensive tendon and muscle damage.

1130 HRS
Report from Dr. Linaweaver
Dr. Linaweaver talked to Dr. Neuman; disastrous injury, through the foot into the base of the foot. Orthopedic staff working on injury. Chances of saving the foot as miraculous.

Gils personal support/Hyperbaric staff.
Hyperbaric Treatment
Major effect is to clean out all foreign material imbedded into the bone; into the porous portion. Next major step is to remove more damaged tissue material.

Notify CAL OSHA and USCG

Definitely infected; surgery again this afternoon to go in to irrigate and monitor the infection; will continue to monitor. Concern infection will spread into heart and lungs. The next 2 days are very critical; will be in the hospital through the weekend.

Did blood cultures.

Dr. Linaweaver will consult with Dr. Neuman; about hyperbaric treatment.

We discussed protective devices that could be developed i.e. shin guard, foot guard, chain saw chaps; also vendor that sells items.

9/11/92
0915 HRS
Update from Dr. Linaweaver:
Material that got imbedded was literally blown into the bone and tissue, today more debridement. Problem – can get chronically infected. Possible definite loss of part of foot. Suggested contact Dr. Neuman; agreed to bring him on as a consultant; hyperbaric facility on site. Infection disease guy is involved. Doctors very concerned that material is blasted into the bone. Most concerned about tendons and bone; may have better feel on the situation later today.

PLAINTIFF'S EXHIBIT 950673

(LOGO) UCSD
MEDICAL CENTER
University of California,
Medical Center

200 West Arbor Drive
San Diego, CA 92103

DISCHARGE SUMMARY

NAME: HOEFLICH, Gil **UNIT NUMBER:** 1 45 95 78

ADM DATE: 09-09-92 **DIS DATE:** 10-21-92 **DICTATOR:** R. Rothen

ATTD PHYSICIAN: M. Botte/Rives

HISTORY OF PRESENT ILLNESS: The patient is a 35-year-old white male who was employed as a deep sea diver who sustained an insertion injection injury of raw sewage into his left foot on September 9, 1992. The patient was brought to the Emergency Department and underwent emergent debridement and four-compartment fasciotomy in the Operating Room. He was then admitted to the hospital for further antibiotic coverage, as well as debridements.

PAST MEDICAL HISTORY: Noncontributory.

PAST SURGICAL HISTORY: Tonsillectomy as a child.

ALLERGIES: No known drug allergies.

CURRENT MEDICATIONS: None.

SOCIAL HISTORY: Noncontributory.

FAMILY HISTORY: Noncontributory.

REVIEW OF SYSTEMS: Noncontributory.

PHYSICAL EXAMINATION: On physical examination, the patient was a healthy-appearing young male. Examination of head, eyes, ears, nose and throat was normal. Chest and lungs were clear. Heart was regular rate and rhythm. Abdomen was soft. Musculoskeletal examination revealed laceration over the middorsum of his left foot, with marked tenderness to palpation. He had decreased sensation to light touch over his dorsal toes, and he had tender, tense compartments. He did have good capillary refill.

LABORATORY DATA: X-ray evaluation showed no bony injury, but air tracking up through his tendon sheaths to the trochanter navicular joint.

HOSPITAL COURSE: The patient was admitted to the hospital and was taken directly to the Operating Room where he underwent fasciotomy and decompression of his foot, as well as extensive debridement. He was then started on triple antibiotics, to include Flagyl, gentamicin, cefazolin, and Ancef. He was then taken back to the Operating Room daily for further debridements.

Through the course of his hospitalization, he grew out of his wound Staphylococcus epidermidis, Bacillus, gram-negative rods, Escherichia coli, Enterococcus faecalis, Klebsiella pneumonia; all consistent with raw sewage injection.

On hospital day number five, the patient's penicillin, Ancef, and Flagyl were discontinued, and he was continued on gentamicin and Timentin. He was also given

Heptavax and hepatitis B immune globulin. As he continued to be febrile, he was started on Amikacin, after consultation with the Infectious Disease Service. For full details on his operative procedures, please refer to his operative notes.

On September 15, 1992, the patient was started on hyperbaric oxygen treatments twice a day and his Timentin was changed to imipenem. Over the next few weeks, the patient continued to spike intermittent fevers and continued on the whirlpool and hyperbaric oxygen therapy.

By the end of the patient's hospitalization, his initially large dorsal wound had closed to approximately 1/4 size in circumference with resolution of some ostemyelitis of his second metatarsal. The wounds from his fasciotomy sites healed well by secondary intention. Repeat cultures taken on October 6, 1992 showed the patient still growing Klebsiella, Pseudomonas, and Staphylococcus epidermidis from his wounds. He was continued on his imipenem and Amikacin.

On October 9, 1992, the patient developed nausea, which was intermittent, and he was seen by the Department of Gastroenterology in consultation. They felt that he had gastroenteritis, and he was started on Mylanta, as well as Zantac, with improvement of his symptoms. After several weeks, the patient's wounds had healed sufficiently, and his cultures were negative on October 20, 1992. He was afebrile off the antibiotics, and it was felt that he could be discharged to home.

DISCHARGE INSTRUCTIONS: Keep left lower extremity elevated at all times. Continue outpatient

hyperbaric oxygen therapy, as well as outpatient whirlpool therapy every day.

DISCHARGE MEDICATIONS: Vicodin, iron sulfate, Zantac.

DISPOSITION/FOLLOWUP: He was given a follow-up appointments in the Infectious Disease Clinic, as well as with Dr. Rives.

/s/ Roberta Rothen, M.D.
Roberta Rothen, M.D.
PMD III

/s/ Illegible

DD: 12-19-92 DT: 12-19-92
RR/mt029 – D1312202.029/37865/VMT: 052

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
Programs (LOGO)

Instructions On Reverse

OMB No. 1215-0160

1. OWCP No. 92391
2. Carrier's No.
3. Name of person making claim (Type or print)

First Middle Initial Last

Gil HOEFLICH

4. Date of Injury (Mo./day/yr.)
   9-9-92
5. Claimant's address (number, street, city, state, Zip code)
   2499 Dorking Place
   Santa Barbara, CA 93105
6. Marital Status
7. Sex
   [x] Male [ ] Female
8. Age or date of birth (Mo./day/yr.)
   3-1-57
9. Social Security Number (Not required by law)
   217-74-2194
10. Did injury cause loss of time beyond day or shift of accident?
    [x] Yes [ ] No
11. On date of Injury give
    a. Hour began work
       [ ] AM [x] PM
       12:52

b. Hour of accident
[ ] AM [x] PM
1:48

c. Did you stop work immediately?
[x] Yes [ ] No

12. Date and hour pay stopped?
[ ] AM [x] PM
9-9-92 5:55

13. Date and hour you returned to work
Claimant remains totally disabled

14. Occupation (Job title; longshore worker, welder, etc.)
commercial diver

15. Injured while doing regular work?
[x] Yes [ ] No
(If "No," explain in Item 24)

16. Wages or earnings when injured (include overtime allowances, etc.)
a. Weekly
$2,000

b. Total earnings during year immediately before injury.
$92,000

17. Has 3rd party or other claim been made because of this injury?
[x] Yes [ ] No

18. Number of years you worked for this employer
5

19. Number of days usually worked per week
5-7

20. Name of supervisor at time of accident?
Ed Thomas

21. Earliest date supervisor or employer knew of accident
9/9/92

22. Were you employed elsewhere during the week injured?
[x] No [ ] Yes (If "Yes," state where and when on reverse.)

23. Exact place where accident occurred (Street address, city, town, name of vessel, pier, terminal, etc.)

Inside submarine sewer outfall off Point Loma, California.

24. Describe in full how the accident occurred (Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse.)

Claimant was struck in foot with 10,000 psi water blaster during a dive.

25. Nature of injury (name part of body affected – fractured left leg, bruised right thumb, etc. If there was a loss or loss of use of a part of the body, describe.)

Severe water blasting injury to left foot and leg. Secondary local and systemic infections.

26. Have you received medical attention for this injury?
[x] Yes [ ] No
(If "Yes," give name and address of doctor, clinic, hospital, etc.)

The lead physician was Karen Rives, M.D. at UC San Diego Medical Center.

27. Were you treated by a physician of your choice?
[x] Yes [ ] No

28. Was such treatment provided by employer?
[x] Yes [ ] No

29. Are you still disabled on account of this injury?
[x] Yes [ ] No

30. Have you worked during the period of disability?
[ ] Yes [x] No

31. Have you received any wages since becoming disabled?
[ ] Yes [x] No (If "Yes," give dates on reverse)

32. Has injury resulted in permanent disability, amputation or serious disfigurement?
[x] Yes (Describe on reverse.) [ ] No

33. Name of employer (Individual or firm name)
Martech International

34. Nature of employer's business
Commercial Dive Contractor

35. Address of employer (Number, street, city, state, Zip code)
3401 West Fifth Street, Suite 150
Oxnard, CA 93030

36. If accident occurred outside the U.S., state whether you are a U.S. Citizen
[ ] Yes [ ] No

37. I hereby make claim for compensation benefits, monetary and medical, under the Longshore & Harbor Workers' Compensation Act

Signature of claimant
or person acting in his/her
behalf /s/ John R. Gilmore

38. Date of this claim
(Mo./day/yr.)
August 24, 1993

Section 31(a)(1) of the Longshore Act, 33 U.S.C. 931(a)(1) provides, as follows. Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

Pre-Hearing Statement
Longshore and Harbor Workers' Compensation

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
Programs (LOGO)

This form is required by regulation (20 CFR 702.317). Failure to return this form at the required time can cause delay in preparation of the case for formal hearing.

OMB No. 1215-0085

1. Employee's name (Last, first, middle)
   Hoeflich, Gil

OWCP No. 13-92391

Carrier No. 345C-364244-1

2. Name, address and phone number of party on whose behalf this form is submitted:

   CIGNA Property & Casualty Companies
   P.O. Box 2228
   Chatsworth, CA 91313-2228
   Telephone No. (818) 701-3500

3. Name, address and phone number of party's representative:

   Roger A. Levy
   Laughlin, Falbo, Levy & Moresi
   Two Embarcadero Center, 5th Floor
   San Francisco, CA 94111-3823
   Telephone No. (415) 239-5594

4. Briefly state the facts of the claim:

   Mr. Hoeflich claims benefits under the LHWCA on the basis of an injury while working as a diver for employer Martech International.

5. State the issues on which the parties have reached agreement:

   None.

6. State the issues you will present for resolution at formal hearing:

   - Crewmember exclusion under Section 2(3)(G) of the LHWCA

   - All other issues deferred

7. List the names of witnesses who will testify in person on your behalf at formal hearing. Also list reports that are to be submitted in lieu of live testimony:

   Witnesses will be disclosed in the course of discovery.

8. List all exhibits, other than reports listed in item 7 above, you intend to submit at the formal hearing. (Use separate sheet or sheets if necessary). If you want the deputy commissioner to send the exhibits to the Office of Administrative Law Judges, you must submit them with this form:

   - Procedural documents filed before the OWCP

   - All other documents identified in the course of discovery will be disclosed in accordance with the court's Pre-Trial Order.

9. Estimate total hours needed for your witnesses to testify:

   2 hours

10. If an interpreter is required, state language:

    N/A

11. Indicate the city of your preference or formal hearing:

San Francisco

Note: Any other matters pertinent to scheduling should be explained on a separate sheet attached to this form.

12. Type or print name of person completing form:

Roger A. Levy
Laughlin, Falbo, Levy & Moresi

13. Signature of person completing form:

/s/ Roger A. Levy

14. Date (Mo., day, year):

11/15/93

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION
PROGRAMS LONGSHORE AND
HARBOR WORKERS' COMPENSATION

NOTICE OF CONTROVERSION OF RIGHT TO COMPENSATION

This report is authorized by law and regulation (33 USC 914(d), (e); 20 CFR 702.233). Failure to report when controverting right to compensation can result in liability for 10 per cent additional compensation.

INSTRUCTIONS: This form may be used by the employer/carrier to controvert the right to compensation. 33 USC § 914(A) requires the employer to pay compensation promptly and without an award unless the right to such compensation is controverted by the filing of this form. Failure either to pay each installment of compensation, or controvert the right to such compensation, within fourteen days after it becomes due may result in liability for additional compensation equal to ten percent of each installment not paid when due. 33 USC § 914(d), (e). If the right to compensation is controverted, this form should be submitted in triplicate to the Deputy Commissioner, and the reasons for such controversion should be fully stated in item 12. All prior issues of Forms LS-207 are obsolete and should not be used.

1. OWCP File No. ~~18-55456~~ 13-92391
2. Employer File No.
3. Carrier File No. 345C 364244-1

4. Claimant's Name and Address

   GIL HOEFLICH
   2499 DORKING PLACE
   SANTA BARBARA, CA 93105

5. Claim File or Injury Reported Under (*check one*)

   [ ] LHWCA [ ] NFIA

   [ ] DCWCA

   [ ] DBA

   [ ] OCS

6. Employee's Name and Address – *If different from Claimant's*

   N/A

7. Employer's Name and Address

   MARTECH INTERNATIONAL
   3401 W. FIFTH ST., #150
   OXNARD, CA 93030

8. Carrier's Name and Address

   CIGNA
   P. O. BOX 2228
   CHATSWORTH, CA 91313

9. Nature of Injury or Occupational Disease

   INJURY TO LEFT LEG & FOOT.

10. Date of Injury (*Month, Day, Year*)

    9-9-92

11. Date of Employer's First Knowledge of Injury (*Month, Day, Year*)

    8-24-93

12. Right to compensation is controverted for the following reason(s)

    CLAIMANT WORKS AS A COMMERCIAL DIVER. CLAIMANT WAS IN WATERS/SUBMARINE WHEN INJURY OCCURRED. CLAIMANT WAS INSIDE SUBMARINE SEWER OUTFALL OFF POINT LOMA, CA.

    CLAIMANT SHOULD FILL [sic] FOR BENEFITS UNDER THE JONES ACT.

13. Authorized Signature

14. Title

    CLAIMS REPRESENTATIVE

15. Date of this Notice
    (*Month, Day, Year*)

    9-28-93

16. (**OWCP USE**) A copy of the form was mailed to the claimant and/or representative on ___. Initials ___.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

GIL HOEFLICH, Plaintiff/Appellant, v. MARTECH USA INC., et al., Defendants/Respondents.	Consolidated Case Nos. AO69336 and AO72913 DECLARATION OF VICTOR TACCONELLI, M.D.

DECLARATION

I, Victor Tacconelli, hereby state and declare that:

1. I am an orthopedic surgeon licensed to practice medicine in California since 1973 and board certified in orthopedic surgery since 1982.

2. I am a member of the Santa Barbara County Medical Society, the American Academy of Orthopedic Surgeons, and the American Academy of Orthopedic Sports Medicine, and practice medicine, with a specialization in orthopedic surgery, in Santa Barbara, California.

3. I became Gil Hoeflich's treating orthopedist in June 1993. On October 26, 1993, following an extensive examination, I determined that Gil has a disability resulting in limitation to semi-sedentary work and would require orthotic inserts in his shoes and sole adjustments on his shoes for life. The last time I examined Gil was February 7, 1994.

4. I have been provided recent photographs of the shoes and orthotic inserts Gil Hoeflich currently wears. I have also been informed that these inserts were prepared in February 1994 based on foot molds obtained in October 1993.

5. Gil personally advises me that he has had no orthopedic evaluation since December 1994, that the shape of his feet appears to be changing, and that he is experiencing soreness or pain, depending on the level of activity, in his lower back and the uninjured right lower extremity.

6. It is my professional opinion that Gil's condition will continue to deteriorate unless he obtains immediate orthopedic evaluation and updated orthotics based on current molds.

I have reviewed the foregoing Declaration and can confirm under penalty of perjury that the facts and opinions contained therein are true and correct, and personally known to me, and that if I were called as a witness herein, I could competently so testify under oath.

Executed this 29th day of March, 1996 in the City and County of Santa Barbara, State of California.

3-29-96
Date

/s/ Victor Tacconelli, M.D.
Victor Tacconelli, M.D.

LANE
POWELL
SPEARS
LUBERSKY

(Letterhead Omitted In Printing)

October 13, 1995

John R. Hillsman, Esq.
McGuinn, Hillsman & Palefsky
535 Pacific Ave
San Francisco, Ca. 94133

Re: Hoeflich v. Martech
Our File No.: 52020.001

Dear John:

With regard to the recent request from Colleen Miller of your office requesting that we pay additional medical and foot wear expenses for Mr. Hoeflich, please note that there is a judgment of the Superior Court determining that Mr. Hoeflich is not a Jones Act seaman. Accordingly, neither Martech U.S.A., Inc., nor its Jones Act carrier have an obligation to pay cure.

We were appointed Martech's counsel for purposes of the Superior Court action, and do not represent Martech for purposes of Mr. Hoeflich's L&H claim against Martech. We refer you to CIGNA, Martech's L&H carrier.

Please contact the undersigned if you have any questions concerning this letter.

GJK:ahw

Sincerely,

LANE POWELL SPEARS
LUBERSKY

/s/ George J. Koelzer
GEORGE J. KOELZER

Law Offices of
LAUGHLIN
FALBO
LEVY &
MORESI

A Partnership Including Professional Corporations

(Letterhead Omitted In Printing)

April 1, 1996

TWO EMBARCADERO CENTER
5TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3823
TELEPHONE (415) 781-6676
FACSIMILE (415) 781-6823

John R. Hillsman, Esq.
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133

Re: Hoeflich v. Martech
LFLM File : 213-95546

Dear Mr. Hillsman:

We have reviewed the request for medical benefits set forth in your letter of March 22, 1996. At this time and for the reasons set forth below, we must decline your request for medical benefits for Mr. Hoeflich.

As you know, our client, CIGNA, provided LHWCA coverage to Martech. Various London Underwriters subscribing to Martech's Marine Employer's Liability policy (hereinafter "London Underwriters") provided "Jones Act" and associated vessel related employee personal injury coverages to Martech. Shortly after Mr. Hoeflich's

accident, Martech and London Underwriters determined that he would be paid maintenance and cure, benefits traditionally reserved for injured crew. In fact, Martech didn't even notify CIGNA that Mr. Hoeflich had been injured. No demand was made for LHWCA benefits until Mr. Hoeflich filed a longshore claim after Martech and London Underwriters unaccountably terminated his maintenance benefits. (We note, parenthetically, that, after terminating maintenance, Martech and London Underwriters continued to provide "cure". It had heretofore been our experience that such benefits always run hand-in-hand.) Understandably, in light of this history, CIGNA denied liability, as "master and agreed with London Underwriters' early positive determination of Jones Act status.

Subsequently, Mr. Hoeflich commenced an action against Martech, seeking the various remedies available to seamen, including those of maintenance and cure. Ultimately, a unanimous jury determined that Mr. Hoeflich was a member of the crew of ARCTIC CAROLYN, and therefore eligible for, among other things, maintenance and cure. The jury confirmed London Underwriters' early determination in this matter. London Underwriters' subsequent reversal of their field has caused the present problem. CIGNA, on the other hand, continues to maintain the position that it took at the outset of this claim, that Mr. Hoeflich is not eligible for benefits under the LHWCA. Accordingly, we must deny your request for medical benefits.

We recognize that this matter has been somewhat complicated by the Martech/London Underwriters reversal of position. However, we question the extent to which such

change is attributal to Martech. Were Martech still a going concern, and not at the end of a Chapter 7 liquidation, we suspect that maintenance and cure would be forthcoming. However, Martech's inconsistent treatment of its injured employees must remain a matter for speculation. As we both know, the current Martech, its Trustee in Bankruptcy, has formally declared that it has no interest in the outcome of Mr. Hoeflich's case.

Please do not hesitate to contact us should you have any further questions in this regard.

Very truly yours,

LAUGHLIN, FALBO,
LEVY & MORESI

By: /s/ Roger A. Levey
Roger A. Levy

cc:

George L. Koelzer, Esq.
LANE POWELL SPEARS LUBERSKY
333 South Hope Street, Suite 2400
Los Angeles, CA 90071